Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HAY'S WESTERN WEAR, INC.
Petitioner

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT, STATE OF LOUISIANA

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71PP

QUESTIONS PRESENTED FOR REVIEW

I. Did the Louisiana Court of Appeal, Third Circuit, err in finding that Hay's Western Wear, Inc. was not entitled to full and just compensation for the taking of its property, thus violating its rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and/or Article 1, Section 4 of the Louisiana Constitution of 1974?

II. Did the Louisiana Court of Appeal, Third Circuit, err in its review of the record by holding that Hay's Western Wear Inc. did not suffer an unreasonable and substantial interference with its property right of access when for a period exceeding one year the State's construction activities repeatedly confused and frustrated travelers of La. Hwy. 397 by causing road closures to switch back and forth without notice from one end of the construction project to the other and, on many lengthy occasions, simultaneous closure at both ends of the project, by failing to provide adequate detour signs, and by failing to provide adequate official alternate routes which resulted in dumping traffic onto little known, dangerous and narrow gravel surfaced farm roads?

III. Whether the "taking" clauses of the 5th and 14th

Amendments of the United States Constitution and Article 1, Section 4 of the Louisiana Constitution permit the denial of compensation for damages incurred by an unreasonable and substantial governmental interference with a citizen's property right of access because the interference to the property right is not unique only to him or it but is general to the public and/or the interference is partial and temporary?

IV. Did the Louisiana Court of Appeal, Third Circuit, violate the constitutional right of Hay's Western Wear Inc. to due process as guaranteed by the 5th and 14th Amendments to the Constitution of the United States by violating its own recognized rules of appellate review, in particular the long established jurisprudential "manifest error" rule by setting aside the trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or refusal.

1. Hay's Western Wear, Inc. through is President, Ray Harris.

2. Ernest C. Hunt, Jr., Hunt Law Firm, and Steven C. McGinity.

3. Ronald J. Bertrand, Special Counsel to the Attorney General of Louisiana and the State of Louisiana Department of Transportation and Development.

4. Hon. Richard Ieyoub, Attorney General for the State of Louisiana.

5. Hon. Kenneth DeBlanc, Clerk, Louisiana Court of Appeals, Third Circuit.

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JURISDICTION

The Supreme Court of the State of Louisiana denied the application of Hay's Western Wear, Inc., for Writ of Certiorari and/or Review to the Court of Appeal, Third Circuit, Number CA 92-1375; Parish of Calcasieu, Fourteenth Judicial District Court, Division "A" 83-6425 on January 7, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 which grants review of the validity of Article 1, Section 4 of the Louisiana Constitution on the ground of it being repugnant to the 5th and 14th Amendments to the United States Constitution and/or the right to due process claimed under the 5th and 14th Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. U.S. Const. Amend. V:

Capital crimes; double jeopardy; self-incrimination; due process just compensation for property

No person shall be held to answer for a capital, or otherwise in famous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval orces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. U.S. Const. Amend. XIV, Sec. 1:

Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. LSA-Const. Art. 1, Sec. 4:

Right to Property

Section 4. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

IV. LSA-C.C. Art. 667:

Limitations on use of property

Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

V. LSA-C.C. Art. 668:

Inconvenience to neighbor

Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

STATEMENT OF THE CASE

I. INTRODUCTION:

This litigation arises out of the total reconstruction and upgrading of 5.1 miles of Louisiana Highway 397, CALCASIEU Parish, Louisiana. For two years the State of Louisiana, Department of Transportation and Development ("State") supervised a series of construction activities along the highway that seriously impaired the ability of Hay's Western Wear, Inc. ("Hay's") to use and enjoy its premises as a retail western apparel store.

The major issue before this court is whether the State took and\or damaged Hay's property right to use and enjoy its premises as a retail sales western wear store when it substantially interfered with Hay's and its customers gaining access to the gene system of public roads by repeatedly confusing and frustrating travelers from the highway with construction activities that caused road closures to switch back and forth (sometimes by the hour) without notice from one end of the construction project to the other and, at extended periods of time, simultaneous

closure at both ends, that failed to provide adequate detour signs and that failed to provide adequate official alternate routes which dumped traffic onto little known, dangerous and narrow gravel surfaced farm roads.

II. PROCEEDINGS WHERE FEDERAL QUESTION RAISED:

Hay's filed this petition for damages on November 28, 1983.[1] Originally, the State was the only defendant.[2] Hay's subsequently amended its petition to include the State's contractor, R. L. Abshire Construction, Inc., and its insurers as party defendants. Those defendants were subsequently dismissed from this lawsuit and the only remaining defendant at trial was the State.[3]

After trial on the merits, the trial court found for Hay's, held that the State substantially interfered with Hay's right of

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[1]R.7

[2]Id.

[3]R. 393.

access, and awarded damages.[4] The Court of Appeal substituted its interpretation of the facts for the reasonable conclusions of the trial court and reversed the trial court's holdings.[5] On January 7, 1994, the Louisiana Supreme Court denied Hay's application for writ of certiorari.

As an inverse condemnation claim seeking "just compensation" from the State for a "taking" caused by governmental interference with a citizen's "property right," the "taking" clause of the 5th Amendment has been an underlying issue since the beginning of this matter.[6] Throughout the proceedings, Hay's has raised this issue through the applicable constitutional provisions and statutes of Louisiana on the theory that the Louisiana's "taking" clause cannot be more restrictive than that of the 5th Amendment. However, the Louisiana Third Circuit, Court of Appeal's interpretation of Louisiana's eminent

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[4]See, Reasons for Judgment of the Trial Court, Appendix B.

[5]See, Opinion of Court of Appeal, Third Circuit, State of Louisiana, NO. 92-1375, See Appendix C.

[6]See, Plaintiff's Petition at R. 7-8.

domain law as applied to the facts of this case is in direct conflict with the present state of federal eminent domain law. In consequence thereof, Hay's has been denied a right guaranteed to it by the United States Constitution.

III. STATEMENT OF THE FACTS:

For two years, from April, 1981 through April, 1983, the State supervised a construction project to totally reconstruct and completely upgrade a 5.1 mile stretch of La. Hwy. 397 in the Chloe-Manchester area of Calcasieu Parish, Louisiana.[7] This was not a simple repaving job. The total reconstruction of the highway involved widening of the road, extensive ditch/drainage work, laying numerous drainage pipes across the highway, removal and rebuilding a box culvert, removal and rebuilding a small bridge, complete excavation and replacement of the old asphalt and concrete base along the north one-half mile of the project, and then paving the entire project.[8] La. Hwy. 397, also

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[7]R. 820, 822-23; See also State, DOTD Weekly Force and Project Reports at R. 441-655.

[8]Ibid; R. 823-26.

known as Swift Plant Road, is the main road in the Chloe-Manchester area.[9] The construction project on this highway was bounded on the north by US Hwy. 90 and on the south by La. Hwy. 14.[10] Within this construction project, there were only two roads with blacktop surfaces that intersected the highway.[11] Both of these roads, Broad Street and East Prien Lake Road, form "T" intersections into La. Hwy. 397 and proceed west into the City of Lake Charles.[12] From the east, La. Hwy. 397 was intersected within the construction project by only a few small gravel surface farm roads; the most significant to this case are McCown Road and Joe Spears Road.[13] McCown Road and Joe Spears Road are 35 foot wide gravel surfaced parish farm roads that connect La. Hwy. 397 with a north/south roadway in the Chloe-

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[9]R. 785; See Exhibit P-2 at Appendix F.

[10]R. 822; See Exhibit P-2 at Appendix F.

[11]R. 786-87; See Exhibit P-2 at Appendix F.

[12]Id.

[13]R. 787-89, 804, 996, 1001-03, 1015, 1019; See Exhibit P-2 at Appendix F.

Manchester area connecting US Hwy. 90 and La. Hwy. 14.[14] Manchester Road, another narrow gravel surface road,[15] is the only other north/south roadway in the Chloe-Manchester area connecting US Hwy 90 and La. Hwy. 14.[16]

With respect to this case, there are three significant bridges over coulees and canals in this area. First, at the intersection of and/or just south of the intersection of Broad Street and La. Hwy. 397 there is a box culvert ("north bridge")[17] for drainage purposes that was completely reconstructed during this project.[18] Second, a short distance north of both Joe Spears Road and East Prien Lake Road is a bridge ("south bridge")[19]

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[14]R. 787-88; See Exhibit P-2 at Appendix F.

[15]R. 872-73.

[16]R. 786-87, 814; See Exhibit P-2 at Appendix F.

[17]During the trial of this case, the box culvert was most often referred to as the "north bridge". See R. 837-38, 1105-06.

[18]R. 797, 1105-06; See Exhibit P-2 at Appendix F.

[19]During the trial of this case this bridge was most often referred to as the "south bridge". See R. 838, 841, 1106.

over Kayouchee Coulee that was also removed and rebuilt during the construction project.[20] Third, there is a bridge (the "Manchester bridge") over the Farmer's Land & Canal Co. canal on Manchester Road between its intersection with McCown Road and its intersection with Joe Spears Road.[21] This Manchester bridge was closed for safety reasons during the construction project from January, 1982 through November, 1982 and, although not part of this construction project, the Manchester bridge was rebuilt while the project was in progress.[22]

For at least ten years prior to the beginning of the construction project, Hay's sold western apparel at the same location on La. Hwy. 397.[23] This retail sales western wear store is located on the east side of the highway between the north bridge and the south bridge at La. Hwy. 397's intersection with a

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[20]R. 823, 832, 841-42; See Exhibit P-2 at Appendix F.

[21]R. 792-93; See Exhibit P-2 at Appendix F.

[22]Id.

[23]R. 1101.

dead-end gravel road named Adele Street.[24]

Hay's customer base was mostly from the rural communities (such as, Cameron, Bell City and Hayes) within a thirty mile radius of the store.[25] Some of its other customers came from the Lake Charles area.[26] However, even though most of Hay's customers were from rural communities (75%), less than 20% were familiar with Manchester Road (25% of 75%) and even fewer customers knew of the existence of the narrow gravel parish farm roads east of La. Hwy. 397; such as McCown Road.[27] Hay's customers from the rural communities used the main roads such as US Hwy. 90 to La. Hwy. 397 when coming from the north and La. Hwy. 14 to La. Hwy. 397 when coming from the south.[28] The customers from Lake Charles also used the main roads; such as US Hwy. 90 or Broad Street to La.

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[24]See, the red dot on Exhibit P-2 at Appendix F.

[25]R. 986, 989-90.

[26]Id.

[27]R. 995-96; See also, 968-69, 984, 987.

[28]R. 996; See Exhibit P-2 at Appendix F.

Hwy. 397 when coming from the north and La. Hwy. 14 or East Prien Lake Road to La. Hwy. 397 when coming from the south.[29]

During the entire two years of the construction project, the State intended to discontinue through traffic on the 5.1 mile stretch of La. Hwy. 397.[30] When the project began in April, 1981, detour signs were erected on La. Hwy. 397 at its intersections with US Hwy. 90 and La. Hwy. 14 displaying the notice "ROAD CLOSED Local Traffic Only" and these signs remained until April, 1983 when the project ended.[31] The State's designated detour from the north was west three miles on US Hwy. 90 into the City of Lake Charles to La. Hwy 14 (a major thoroughfare in the City having numerous traffic lights, many retail establishments and a heavy traffic load), then south on La. Hwy. 14 approximately five miles to the point where La. Hwy. 14 turns east, then east three miles on La. Hwy. 14 to La. Hwy.

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[29]Id.

[30]R. 834-37.

[31]Id.; See also, Exhibit P-9C.

397.[32] The designated detour from the south was the same eleven mile route in reverse.[33] This detour by itself added at least one hour to a traveler's trip[34] and also directed western apparel shoppers into the heart of Lake Charles where Hay's major competitors were located.[35] Also, after the detour signs were erected, people who weren't required to travel on La. Hwy. 397, including shoppers of western apparel, simple avoided the area completely.[36] Hay's sales records reflect this occurrence.[37] Despite a steady growth in sales since at least 1978 and while other major competitors' sales continued to grow, the sales of Hay's leveled off before any major construction started as soon as the detour signs were erected in April, 1981.[38] The simple act

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[32]R. 834-37.

[33]Id.

[34]R. 972; See also 965.

[35]R. 957-58.

[36]R. 1035-37; See also 976, 1022-23.

[37]R. 665-66.

[38]Id.

of erecting detour signs caused some interference with Hay's business.[39]

A construction project has stages where the activity begins at a "low key" then progresses to a "high key", then drops off again to a "low key".[40] In this case, the construction activity was at a "high key" in excess of one year.[41] During this stage of "high key" activity, the interference with traffic flow on the project was "considered quite a bit" by the State's project engineer.[42] This activity included the use of numerous tractor trailers and other heavy machinery to perform the massive excavation work and extensive drainage and ditch work to widen, upgrade and reconstruct the entire highway.[43] For over one year, this "high key" activity was occurring simultaneously throughout the entire length of the project and always caused at

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[39]See, Id.

[40]R. 825-26.

[41]Id.

[42]Id.

[43]Id., See also R. 966.

several different points within the construction zone much interference with the traffic flow.[44]

In addition to and simultaneously with these activities, access to the store by Hay's and its customers was more severely interfered with when traffic flow was denied at points on the highway during the north bridge construction from October 5, 1981 to February 26, 1982,[45] the south bridge construction from June, 1982 through September, 1982,[46] the twenty-one cross drain installations across the highway at various times and various locations north and south of Hay's from March 6, 1982 to September 17, 1982,[47] and excavation and replacement of the entire asphalt and concrete base along the north one-half mile of the project from July 16, 1982 through October 17, 1982.[48]

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[44]R. 825-26; See also, 894-96, 976-77, 986, 1006-07, 1015-16, 1018-21, 1023, 1075-76.

[45]R. 838-39; See also Exhibit P-12 at Appendix G.

[46]R. 841-42; See also Exhibit P-12 at Appendix G.

[47]See Exhibit P-12 at Appendix G.

[48]R. 1062-63; See also Exhibit P-12 at Appendix G.

Further exacerbation of the access problems to Hay's included the ill-conceived planning that involved the activities causing closure of the highway, the lack of sufficient detours and detour information, the deplorable condition of McCown Road and the closure of the Manchester bridge from January, 1982 through November, 1982. The construction activities involving closure of the road were performed in a manner that caused, on numerous occasions, and without any apparent planning, the road closures to switch back and forth between the north end and the south end (sometimes on an hourly basis) and, at many extended periods of time, closure at both ends of the project simultaneously.[49] This caused frustration and confusion to the travelers on La. Hwy. 397 because they never knew which route, if any, would be open.[50] These travelers were further frustrated by the fact that there were no detour signs advising of alternate

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[49]See Exhibit P-12 at Appendix G.

[50]R. 894-96, 986, 1006-07, 1015-16, 1018-21, 1023, 1075-76.

routes when they encountered a road closure.[51] Additionally, the route via McCown Road, which was never an official detour route[52] but was often the only route available during the construction project,[53] was in terrible condition.[54] This narrow, gravel surfaced farm road had a one lane bridge with no guard rails and was always full of standing water, mud and potholes.[55] Vehicles would easily lose traction, slide through the slushy gravel and mud and some vehicles would end up stuck in up to ten inches of mud.[56] Even some trucks would drag bottom while traveling on McCown Road.[57] Some frequent users of this route noted problems keeping their vehicles clean of mud and dirt and

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[51]R. 802, 892, 1002, 1020-21, 1023 and 1076.

[52]R. 838.

[53]887-88, 968, 1015, 1020, 1076.

[54]R. 890-91, 896, 966-68, 976-77, 981, 985, 1001, 1019, 1023, 1052-53; See also Exhibit P-10.

[55]Id.

[56]Id at 890-91, 896-97, 966-67, 1019.

[57]R. 1001.

maintaining alignment of their tires.[58] Also, the closing of the Manchester bridge forced people using Manchester road as a detour from the south to risk taking other unknown gravel surfaced farm roads that were in similar condition to McCown Road.[59]

This gauntlet of obstacles and adverse conditions confronting Hay's customers caused a negative impact of Hay's sales and thereby its profits.[60] Between April, 1981 and December 1984 Hay's share of the western apparel market dropped from 25% to below 18%, resulting in lost profits of approximately $112,600.00.[61]

ARGUMENT

I. INTRODUCTION.

This inverse condemnation claim is seeking compensation from the State for the "taking" or "damaging" of

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[58]R. 896-97, 966-67, 1023.

[59]R. 1019-20.

[60]R. 916-17; See also, Exhibit P-8 at R. 663-68.

[61]Id.

Hay's property rights to use and enjoy its premises as a retail sales western apparel store.[62] Hay's claims that the road construction activities by the State were abusive, excessive and so substantially interfered with Hay's property right of access that a violation occurred pursuant to both the 5th and 14th Amendments to the United States Constitution and Article 1, Section 4 of the Louisiana Constitution.

This is a loss-of-access claim of a partial and temporary nature, but the loss-of-access was none the less abusive and substantial. As shown by the record and as was held by the trial court, for a time exceeding one year the State's activities substantially interfered with Hay's right of access to the system of streets and thoroughfares in a manner of travel normally used by Hay's and its customers. In that year, the State's activities during the construction repeatedly confused and frustrated travelers of La. Hwy. 397 (the main paved thoroughfare in the Chloe-Manchester Area) by permitting road closures to switch back and forth without notice from one end of the construction

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[62]See, Plaintiff's Petition at R. 7-8.

project to the other and, on many lengthy occasions, simultaneous closure at both ends, by failing to provide adequate detour signs, by failing to provide adequate official alternate routes and by taking no action to upgrade the condition of the roads which became defacto detours. For Hay's, the lack of adequate alternate detours caused almost complete reliance on McCown Road as the de facto but undesignated detour. During the construction project, McCown Road was a gravel surfaced farm road in very poor condition which was dangerous for travelers in passenger vehicles. McCown Road was adequate for use by farmers driving four wheel drive trucks, tractors and other farm machinery. However, it was a wholly unreasonable alternative, even as a detour, for the passenger type vehicles usually accustomed to using La. Hwy. 397 for access to Hays. If the State would have improved and upgraded McCown Road for use by passenger type vehicles, it might have served as a reasonable detour during the construction project were it not for the distance involved (as much as eleven miles). Instead, the State chose not to designate McCown Road as an official detour

and literally forced the use of a totally unreasonable alternative. The net result is that the State substantially interfered with and abused Hay's right of access due to its failure to ensure that sufficient and proper alternate routes were available and were identified.

II. **PURSUANT TO THE "TAKING" CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND/OR ARTICLE 1, SECTION 4 OF THE LOUISIANA CONSTITUTION, GOVERNMENT INTERFERENCE WITH HAYS' PROPERTY RIGHT OF ACCESS WAS UNREASONABLE, ABUSIVE AND SUBSTANTIAL WHEN, FOR PERIOD EXCEEDING ONE YEAR, THE STATE'S CONSTRUCTION ACTIVITIES REPEATEDLY CONFUSED AND FRUSTRATED TRAVELERS OF LA. HWY. 397 BY CAUSING ROAD CLOSURES TO SWITCH BACK AND FORTH WITHOUT NOTICE FROM ONE END OF THE CONSTRUCTION PROJECT TO THE OTHER AND, ON MANY LENGTHY OCCASIONS, SIMULTANEOUS CLOSURE AT BOTH ENDS OF THE PROJECT, BY FAILING TO PROVIDE ADEQUATE DETOUR SIGNS, AND BY FAILING TO PROVIDE ADEQUATE OFFICIAL ALTERNATE ROUTES WHICH RESULTED IN DUMPING TRAFFIC ONTO LITTLE KNOWN, DANGEROUS AND NARROW GRAVEL SURFACED FARM ROADS.**

A. Under the circumstances of this case, the magnitude of the governmental interference to Hay's property right of access greatly exceeds that which must be tolerated as a general consequence of the State's construction activities.

The law concerning the "taking" of access rights has followed an inconsistent application of legal principles.[63] This was a natural result of some forms of loss-of-access cases arising earlier than other kinds of non-trespassory takings when the courts were not willing to recognize takings without touching.[64] During the development of loss-of-access cases, the courts have frequently failed to ground their doctrines in sound eminent domain principles, but instead substituted arbitrary rules that, beside being indefensible in theory, may be meaninglessly broad or inflexibly narrow.[65] In this case, the Court of Appeal denied recovery to Hay's for this taking by improperly adopting several different eminent domain principles developed in Louisiana over

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[63]See, William B. Stoebuck, The Non-trespassory Taking in Eminent Domain, 22 (1977).

[64]Id.

[65]Id.

the years. Its conclusion that Hay's did not suffer substantial interference is based on earlier legal doctrines which no longer operate today as "blanket hard and fast rules" to bar recovery. These principles are today nothing more than factors to consider in the light of the factual circumstances of each loss-of-access case.[66]

Accordingly, interpretation of the factual evidence as to how it applies to the constitutional principles of "taking" is at the heart of this case. To date, the Trial Judge, the original trier of fact, held that Hay's suffered substantial interference with its property right of access due to action by the State. The Court of Appeal, the second, although improper by its own rules, trier of fact, held otherwise. Clearly, reasonable minds might differ in this case. But when constitutional principles are at stake, this Supreme Court must also review the evidence to make certain those principles have been constitutionally applied so that the

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[66]See, State through DOTD v. Chambers, 595 So.2d 598, 604 (La. 1992).

appropriate enforcement of a constitutional right is assured.[67] This Supreme Court must make an independent review of the whole record to determine whether, as a matter of law, the State's interference with Hay's property right of access was sufficiently substantial to constitute a "taking" requiring compensation under the 5th and 14th Amendments of the United States Constitution and/or Article 1, Section 4 of the Louisiana Constitution.[68]

To prove Hay's property rights were taken or damaged, the construction activities on the State's land must have resulted in serious inconveniences or interference that can be suppressed under LSA-C.C. Arts. 667 and 668.[69] These Louisiana Civil

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[67]Washington ex. rel. Oregon R. & N. Co. v. Fairchild, 244 U.S. 510, 32 S.Ct. 535, 56 LEd 863 (1912); Greenbilt Coop. Pub. Assoc. v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, LEd.2d 6, 13 (1970).

[68]Id.

[69]State through DOTD v. Chambers Inv. Co., 595 So.2d 598, 604 (La. 1992), Acadian Heritage Reality v. City of Lafayette, 434 So.2d 182, 185 (La. App. 3rd Cir. 1983), Ursin v. New Orleans Aviation Board, 506 So.2d 947, 955-57 (La. App. 5th Cir., 1987).

Code articles establish that although a landowner may exclude most interference with his property, he must tolerate certain inconveniences resulting from the lawful use of a neighbor's property.[70] This rule of law is similarly applicable when dealing with either government and the law of inverse condemnation[71] or private persons and the law of nuisance.[72] In determining the type of inconveniences that must be tolerated, one must determine the reasonableness of the conduct in light of the circumstances.[73] Some types of unreasonable conduct recognized in Louisiana are ultrahazardous activities, abusive or excessive conduct, and acts causing physical property damage or personal injury.[74] To determine whether the State's activities resulted in

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[70]Id.

[71]Chambers, supra, Acadian Heritage Realty, supra, Ursin, supra.

[72]Rodrigue v. Copeland, 475 So.2d 1071, 1077 (La. 1985) and Hero Lands Co. v. Texaco, Inc., 310 So.2d 93, 696-98 (La. 1975).

[73]Rodrigue, supra, Hero Lands Co., supra at 98 and Acadian Heritage Realty, supra, at 1986.

[74]Chambers, supra at 604-5.

unreasonable conduct, requires consideration of factors such as the characteristics of the neighborhood or area, the nature and degree of the intrusion to property rights and the effect on those rights.[75]

Of first consideration is the characteristics of the area confronting the State during the construction activities. In this case, the State embarked on a massive reconstruction project of La. Hwy. 397, the only major road in the Chloe-Manchester area.[76] As the main road, it was the sole access for several industrial, commercial and retail businesses in the area.[77] Within the construction project, La. Hwy. 397 was intersected by very few roads[78] and, more pacifically, there were no roads intersecting this highway between the north bridge and the south

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[75]See Chambers, supra at 605-06 and Rodrigue, supra.

[76]R. 785, 820,822-26; See Exhibit P-2 at Appendix F.

[77]R. 785, 820, 822-26; See Exhibit P-2 at Appendix F.

[78]R. 786-89, 804, 996, 1001-03, 1015, 1019; See Exhibit P-2 at Appendix F.

bridge except for one narrow gravel surfaced parish farm road named McCown Road.[79] The existence of this farm road, like all farm roads in the area, was virtually unknown to most of the people who traveled on La. Hwy. 397 and shopped at Hay's.[80] For most people, use of the main road (La. Hwy. 397) was their only known option.[81] Additionally, these farm roads, especially McCown Road, were in terrible condition.[82] At trial witness, Myron Sittig described McCown Road as follows:

. . .

Q Now tell me about McCown Road; did you ever encounter any difficulty on McCown Road?

A Yes, sir; I got stuck a couple of times.

Q What do you mean you got stuck; in the road or in the ditch?

A In the mud. It was in the road. The road was very muddy and had potholes, and I got stuck.

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[79] Id.

[80] R. 995-96; See also 968-69, 984, 986-87, 989-90.

[81] Id; See also 996 and Exhibit P-2 at Appendix F.

[82] R. 890-91, 896, 966-68, 976, 981, 1001, 1019-20, 1023.

Q How wide was the road portion of McCown Road?

A It might've been two car lengths wide, but the sides were so soft that if you got near it you were in the ditch. We passed several vehicles in the ditch during that time.

Q Is there any type of bridge on McCown Road?

A Yes, sir, there's one.

Q Where is that as between 397 and Manchester Road?

A It's right as you turn off of Manchester on to McCown Road.

Q Heading west?

A West, yes, sir.

Q And how many lanes are there in that bridge?

A One.

Witness Brenda LaCombe stated:

. . .

A . . . Now, when I was driving on McCown and Manchester, McCown was in horrible condition. When it rained it was -- you'd skid all over the road. I had little children with me and it was kind of scary. The bridge was real bad. It was a narrow one-lane bridge. It had no rails on the side. Even when McCown was dry, the potholes

were horrible. My car had to be -- I had my front aligned about twice in this time period.[83]

. . .

Q And which road are you talking about?

A McCown Road.

Q Did you feel it was dangerous?

A Yes, I do.[84]

James McDonald relayed his experiences on McCown road as follows:

A Then after that, there were times that trying to go either way, either north or south on 397 was blocked, but you could go back through the gravel roads -- it's McCown Road, and go down it, but it was rough going. It had potholes that were deep and all. And I remember one occasion where my truck drug bottom on going through some of the holes. It was a real rainy season and it was muddy and all.[85]

Witness Pauline Daughenbaugh, further explaining the

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[83]R. 966-67.

[84]R. 976.

[85]R. 1001.

condition of McCown Road and the other farm roads in the area, said:

. . .

> A . . . There's a back farm road, McCown Road, but the road is so full of potholes and muddy, it holds the water the majority of the year, any time we'd have a rain. But if the Manchester Bridge is out, which it stayed out for a while, okay? then you're still looking to come back down through another farm road that's bad, you know, if the bridges are in. A lot of our problem is the bridges on these back farm roads, but anyway, try to come down like that.

As explained by Mrs. Daughenbaugh, the closure of Manchester bridge forced people seeking a rout to La. Hwy. 397 into the tenuous situation of forging ahead on unknown and dangerous farm roads. The fact that the Manchester bridge was closed for safety reasons from January, 1982 through November, 1982[86] is further evidence of the poor conditions of these roads.

These farm roads may have been in adequate condition for farmers to drive their tractors and other farm machinery. However, they were no real alternative for either the type or the

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[86]R. 792-93.

volume of traffic usually accustomed to using La. Hwy. 397. For retail store such as Hay's, being located between the north bridge and the south bridge is a unique factor to these circumstances that made it so very important to maintain, at the very least and in a consistent manner, reasonable access on La. Hwy. 397 from either the north or the south. This need is even more evident when one considers the unique situation of Hay's as being the only retail sales business with its entire customer base outside the construction project.[87] No person could rightly expect retail shoppers in passenger vehicles to use those farm roads. This was the apparent intent of the State because testimony at trial indicated that the State did not intend for anyone to detour on those farm roads.[88] In fact, Gene Caldwell, the State's Project Engineer, testified that because no other State routes intersect La. Hwy. 397 within the limits of the construction project, the State was required at all times to

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[87]R. 986m 989-90, 1080-81; See, the Trial Court's Written Reasons for Judgment at R. 763.

[88]R. 838.

maintain access from either the north end or the south end of the project and that closure of the road in two separate places at any one time was denying access to the traveling public.[89] Although the State may have intended to always maintain access on the highway from either the north or the south, the record shows that for much of the time during the project, the only route available to Hays was via farm roads.[90] This fact was ignored by the Court of Appeals.

As admitted by the State's project engineer, construction activities, no matter how slight, inconveniences traffic.[91] This is supported by the fact that as soon as the official detour signs were erected in April, 1981, shoppers began avoiding the area[92] and Hay's sales leveled off.[93]

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[89]R. 1108.

[90]R. 887-88, 968, 1015, 1020, 1076.

[91]R. 826.

[92]R. 1035-37, See also, 976, 1022-23.

[93]R. 665-66.

However, construction activities quickly increased in intensity to a "high key" level that was quite extensive both in size and duration.[94] In addition to and simultaneously with these activities, access was denied at points on the highway during the north bridge construction, the south bridge construction, the twenty-one cross drain installations across the highway at various times and various locations north and south of Hay's, and the excavation and replacement of the entire asphalt and concrete base along the north one-half mile of the project.[95] For over one year, this "high key" activity was occurring simultaneously throughout the entire length of the project and always caused at several different points within the construction zone much interference with the traffic flow.[96]

These "high key" construction activities, even if performed in a most organized and efficient manner (which is

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[94]R. 825-26.

[95]R. 838-39, 841-42, 1062-73; See also Exhibit P-12 at Appendix G.

[96]R. Id.; See also, R. 894-96, 976-77, 986, 1006-07, 1015-16, 1018-21, 1023, and 1075-76.

denied) and with due consideration of the character of the area (which is also denied), will cause "quite a bit" of interference to one's property right of access.[97] However, in addition to the duration, size, and extensiveness of this project, Hays suffered substantially more interference due to the abusive and excessive manner in which the construction activities were performed. As if without any scheme or plan, activities causing road closures constantly switched from the north end to the south end of the project and, for extended periods of time, both ends of the project would close simultaneously.[98] This caused frustration and confusion for Hay's and its customers because they never knew which route, if any, would be open.[99] This was the conclusion of the trial court[100] and these factual determinations are fully supported by the record.

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[97]R. 826.

[98]See Exhibit P-12 at Appendix G.

[99]R. 894-95, 976-77, 986, 1006-07. 1015-16, 1018-21, 1023, 1075-76.

[100]R. 761-62.

The north bridge was closed form October 5, 1981 to February 26, 1982.[101] However, as soon as the bridge was opened, cross-drains were installed around the north bridge from March 6 through April 2.[102] The highway was maintained and the "Road Closed" signs were positioned in a way to mislead travelers into believing the road at the north end remained closed.[103] Brenda LaCombe testified that she attempted to use the north route every school day and did not realize the north bridge was open until Easter of 1982. She said:

. . .

Q Now when you first started driving and they first started the work which way did you travel to get to the store?

A Before they tore up the bridge I would go down Highway 90 and turn left on 397 and go pick up the kids and come back that same way.

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[101]R. 838-39; See Exhibit P-12 at Appendix G.

[102]See Weekly Force & Progress Report Nos. 48, 49, 51, 82 at R. 561, 559, 555, 553, respectively; See also Exhibit P-12 at Appendix G.

[103]R. 964-65; 970.

Q When you say tore up the bridge, you're talking about the north bridge or the south bridge?

A The north bridge.

Q And where would you go after they tore up the north bridge?

A I had to go down Manchester and then McCown and then hit 397.

Q Was there any other way to get there other than that route?

A Well, if I wanted to detour all across town I could go the long way, all the way down to Highway 14, which would be totally out of my way.

Q You'd have to go to 14 and then --

A Go all the way around 14 and come up 397.

Q -- and come up 397?

A Right.

Q And I'm sure you don't recall the dates or for how long that north bridge was closed, do you?

A All I can remember is that it was not long after school started. It was during Wintertime and it - until -- I can't tell you exact dates. The only thing I can remember is that around Eastertime I was going to pick up the kids on that road and it had been open because -- and the reason I

remember is because I got a ticket on the road that day.[104]

. . . .

Q Let me ask you this. If my records show that the north bridge was closed from October of '81 to the end of February of '82, and that's quite a long time, I think from February 26th until Easter, what was the reason that you couldn't travel, say, from the 26th of February until --

A I can't tell you exactly when it opened. The only thing I can tell that makes me remember being down that road is the ticket, and it was prior to Easter.[105]

Also, while those cross-drains were being installed at the north end, cross-drains were also being installed at the south end.[106] The installation of these cross-drains either near or south of the south bridge caused actual road closures to switch back and forth from the north to the south. However, to some people

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[104]R. 964-65.

[105]R. 970.

[106]See, Weekly Force & Progress Report Nos. 49, 50, 51, 82, 83, 84, at R. 559, 557, 555, 553, 551, 549, respectively.

such as Ms. LaCombe, there was the perception that the road was closed at both ends simultaneously.

Simultaneous road closure was not just a perceived problem. It actually occurred between June and September of 1982 when the south bridge was closed, additional cross-drains were installed, and the complete excavation of the north end of the highway was accomplished.[107] Contrary to the findings of the Court of Appeal, the trial court found that these activities closed La. Hwy. 397 both north and south of Hays simultaneously.[108] This factual determination is also supported by the record. Myron Sittig testified:

. . .

Q And during 1981 did you encounter any difficulties?

A Yes, sir.

Q Would you tell me when and how?

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[107]R. 841-42, 1062-73; See Exhibit P-12 at Appendix G.

[108]R. 762.

A I don't recall the dates, but I do recall the difficulties in getting out. There were days -- I'm not sure if it was '81 or '82, but there were days that I'd have to go down and go to McCown Road, go east on McCown Road, go north on Manchester Road, come back west on 90 and hit the Interstate 210.

Q Why couldn't you go to the south?

A There was a bridge out.

Q And how long was that bridge out?

A I don't know, but it was a while.

Q Was there any other way for you to get out other than to go to McCown Road?

A Not when they had the north bridge out also. When both were out, that was the only way out.

Q When you say they were both out, were they out at different times or at the same time?

A The north bridge was out for a while without the south bridge but at one -- a while there they were both out at one time.[109]

Also, Pauline Daughenbaugh stated that this situation lasted for months when she said:

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[109]R. 887-88.

Ray Harris also confirmed this when he said:

. . . .

Q . . . Mr. Caldwell has testified that on no occasion was both ends of 397 cut off. Now during the time when the south bridge was being constructed, was there ever any time when you know that the entirety of the road or the bridge at the north end was shut down to where it was cut off at both ends?

A Where it was closed both at the same time?

Q Yes, sir.

A They definitely were closed at the same time.

Q You know that of your own knowledge and you saw it?

A Yes, sir.

Q And for how long a period was that?

A I don't remember the dates, but it was for a while. It was for a good while. It was months. It wasn't a week or day or two; it was months at a time.

Q And was there a barricade to keep traffic from going through at that time?

A Were there signs?

Q Signs, yes.

A Detouring, at the north end, yes, sir. Whenever you first turned in.

Q When you say it was closed, what do you mean it was closed? It was impassable or --

A If you were to turn from 90 heading south going to 14, you couldn't make it. If you were to turn on to 397 from 14 going north, you could not go to 90.

Q Why could you not go?

A Both bridges was closed at the same time. Or they were digging up and putting pipes up, in different locations.

Q And you've heard testimony from this gentlemen about they were supposed to do half the road at one time; is that the situation you found, or did you find the whole road closed?

A In reference to the bridges and the north end work?

Q Yes, sir.

A It was done all at one time. It was not done half at a time.[110]

During the construction project, Ray Harris kept notes of the activities he observed between August of 1982 through the end of the project. His recollection of these days explaining the

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[110]R. 1144-46.

full extent to which the north end was blocked while the south bridge was closed is found in the Record at pages 1062 through 1070.

Further evidence of the abusive and excessive manner in which the construction was performed was the fact that when the highway was closed there were no detour signs advising of alternate routes.[111] Myron Sittig recalled:

> Q Did you ever see any detour signs on 397?
>
> A It had "Road Closed" maybe once, but it didn't have any -- It just said "Road Closed" and "Detour", but it didn't have directions as to where to detour to.

Al Prater, the Public Works Director for Calcasieu Parish, indicated that it was usual practice for the State not to put up "Detour" signs. He said:

> A . . . A lot of times they don't put up signs, you know, directing them where to go' they just kind of dump it off on us and we assume traffic.
>
> Q That's a good question. If they don't put up signs, who do you ask?

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[111]R. 802, 892, 1002, 1023, 1076.

A Well, you use your road map or something to figure out where you're going, but, you know they're not designating that the traffic is to take our road, but it happens to us.

Q When you say use a road map, you're talking about a state road map or a parish road map?

A Probably a parish road map. I don't think -- The parish roads are not going to be on the state roads.

Q So if you didn't know where McCown Road was, or Manchester Road, those do not show up on your state map; is that correct?

A I don't think they would.[112]

Pauline Daughenbaugh explained her frustration when she testified:

. . .

A . . . See, it takes a lot -- We're talking -- My biggest gripe about all this, is the time it would take me to try to get to Ray, Jr. and I'd hit a detour sign. Okay? So I'd have to go back and try another detour, with no explanation saying, "Well, you could go this way," or point an arrow or, you know, "It'll be open in a day or so." If I was given any information, that would've saved me a lot of personal time, and time is money, like anybody's time. But here, I'm running around, you know, that I have to go back to a

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[112]R-802.

telephone and call Ray, Jr. and say, "How do I get to you?"[113]

The frustrations and confusion caused by the arbitrary road closures and by the lack of proper detour information is evident by the testimony in the record.[114] Myron Sittig explained her frustration when she testified:

. . .

Q Did you ever have any difficulty in getting to the Hay's Western Wear Store?

A The same difficulty I had coming and going every time I left my house, which was -- I would leave one morning to bring my husband and if I come back two hours later I may not be able to come in that way, I'd have to go all the way around. Like, when the south bridge was in, take off and leave, or -- At one time they even had shell in the area and you could come, but then you may go out and come back two hours later and it's dug up and you couldn't come back that way and you had to go all the way around. There may -- I mean, there were cuts back there, I know now, but I did not know at the time.

Q How many times did that happen to you?

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[113]R. 1023.

[114]R. 894-96, 986, 1006-07, 1015-16, 1018-21, 1023, 1075-76.

A Several.

Elaine Ritchey, a store employee, explained:

A We'd get calls -- A lot of our business came from Cameron, Bell City and Hayes, especially around rodeo season or just, you know, -- That was a lot of our customers on that end. And they would call and want information on how to get there. We started giving them directions coming down Manchester, and then from -- Well, -- But then we started getting a lot of complaints that they couldn't even go down there because of the road conditions, to where we would get calls that they were telling us that they didn't know how to get there and we were dumbfounded. It got to where we were telling them how to circle all around, which -- coming down Highway 14 to Prien Lake Road or going to Highway 90.

Q Were there any points during that period where you had to change what you were telling them --

A All the time.

Pauline Daughenbaugh also stated:

. . .

Q Well, did you know from one time to the next how you were going to be able to get there?

A Never. Because it could change like -- I could've went through, say, to go up, down 397 north and then go into town like up East Prien Lake Road, and maybe coming back I couldn't

come back through. You see what I'm saying? -- to go the same direction I just came.

Q Why not?

A Because a detour sign was put up; the road was closed.

Q You mean, after you would go one way and then try to go back they would've changed it?

A Yes, sir.

Q And would that happen within one day that this would happen?

A Oh, this would happen -- Oh, yeah, this would happen within an hour. You know, I'm just saying from where - You know, I've ran errands for an hour or so and had to go back by Hay's store to pick up whether it be hats or saddles or whatever and come back and it was closed; I couldn't go back.

Q How many times has this happened to you?

A More than once. Easily, five or six times over the period.[115]

. . . . .

Q And what problem did you encounter on Highway 397 at that point?

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[115]R. 1015-16.

A Well, the road was just blocked off. You couldn't go down -- It wasn't open; it was under construction; it was a detour.

Q To the best of your memory, how long did it stay closed?

A On and off, better than two, three years.

Q Well, at the end of the project, either down to the south and to the north, did they keep signs posted to tell you what was going on give you a route or tell you how to get to any place in between?

A There was never a route. There was always just "Detour". Then you'd come back around the other side, "Detour". You never knew "Detour" an hour, "Detour" a couple of days, "Detour" a week, or "Detour" using an alternate route. It was never -- It was never -- It got to the point that before I left the house back here, which we lived in the country, I'd call Ray, Jr. and say, "Okay, what's open today? How am I going to get to you?"

Ray Harris testified as to the numerous complaints he received from his customers. He said:

. . . .

Q Mr. Harris, is there any question in your mind as to what caused your business to start sustaining losses after 1981?

A The closure of the bridges and isolating us from everything.

Q And was it readily apparent to you what the basis for the problem was?

A You mean, what caused it, or the bridges being shut?

Q Yes. How did you know that's what was giving you the trouble?

A Because all the phone calls we had and the people weren't coming because of the detours. They never knew from one day to the next how to get to the store. They didn't know if there was going to be a route.

Q Did you have complaints?

A Constantly.

Q Are we talking about one or two isolated complaints or how often did you get complaints?

A Every day, two, three, four, a dozen, but there was a complaint every day.

Q Did you lose customers?

A Definitely.[116]

Due to space limitations, we were unable to include the testimony of many other witnesses in this application.

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[116]R. 1075-76.

The testimony of these witnesses, the documentary evidence and the record as a whole fully support the trial court's conclusion that the construction activities resulted in extreme difficulty and substantial interference with Hay's and its customers gaining access to and from the store. Since the Court of Appeal was faced with a cold record which presents no opportunity to hear firsthand the testimony of witnesses or to observe their demeanor in court, Trial Judge was in a better position to evaluate their credibility and to weigh the evidence.[117] For this reason, the reviewing Court must give great weight to the factual conclusions of the trier of fact and where there is a conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review; even though the reviewing court may feel that its own evaluations and inferences are as reasonable.[118]

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[117]Canter v. Koehring, 283 So.2d 716, 724 (La. 1989).

[118]Id.; See also, Rosell v. ESCO, 549 So.2d 840, 844-45 (La. 1989); Acadian Heritage Realty v. City of Lafayette, supra, at 189.

In this case, the Court of Appeal, Third Circuit rejected the factual findings of the trial court and, in doing so, rejected Louisiana's "manifest error - clearly wrong" appellate review standard. That Court has increasingly disregarded this appellate review standard to the point that the issue escalated to a public controversy[119] wherein the chief judge of that circuit stated that the majority opinion in Kelly represented a "dramatic departure from the recognized rules of appellate review."[120] In this case now before you, Hay's asserts that the Court of Appeal, Third Circuit again exceeded its legal authority to review the factual determinations of the trial court. This action violated Hay's constitutional right to procedural due process as guaranteed by the 5th and 14th Amendments to the United States Constitution.

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[119]See, Lake Charles American Press, December 23, 1993, at page 1, col. 5, reporting on the recent case of Kelly v. Louisiana Limestone Aggregate, No. 92-1287, slip op. at separately paginated dissent (La. App. 3rd Cir., December 15, 1993) (Domengeaux, C. J. and Yelverton, J. dissenting) at Appendix E.

[120]See a copy of the article and dissenting opinion attached as Appendix E.

For this reason, the factual conclusions of the Court of Appeal should not bear as much weight as those of the trial court.

B. In the interests of equity, just compensation cannot be denied when there has been unreasonable, abusive, excessive and substantial governmental interference with one's property right of access merely because the interference with the access was not unique only to him but was general to the public and/or the interference was partial and temporary.

The court of appeal held that Hay's did not experience interference compensable "under our law."[121] In addition to rejecting the factual determinations by holding, there was no evidence in the record of excessive and abusive conduct by the State,[122] the Court of Appeal denied Hay's recovery because the inconvenience experienced by Hay's was not peculiar to it but was experienced by the public at large and because Hay's loss-

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[121]Opinion of the Court of Appeal, Third Circuit, No. 92-1375 at p. 4, See Appendix C.

[122]Hays' objection to this holding is fully argued in the brief, See Argument II, A.

of-access was never completely blocked.[123] It presents these reasons as irrebuttable presumptions which automatically deny Hays' claim for compensation due to governmental interference with its property right of access.[124] However, these principles of law should not operate as a blanket, hard and fast rule to bar recovery.[125] The United States Constitution 5th Amendment's "just compensation" provision is designed to bar government from forcing some people to bear the burdens which, in all fairness and justice, should be borne by the public at large.[126]

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[123]Id.

[124]Id. at 3-4.

[125]See, Constance, 626 So.2d 1151, 1157, 1159-61 (concurring opinion of Dennis, J.)(La. 1993) Chambers, supra, at 604, Rodrigue vs. Copeland, 475 So.2d 1071, 1077 (LA. 1985), Acadian Heritage Realty, supra at 1986, Hero Lands Co. vs. Texaco, Inc., 310 So.2d 93, 98 (La. 1975); In review of LSA-C.C. arts. 667 and 668, all of these cases held that the trier of fact must consider the reason-ableness of the conduct in light of all the circumstances.

[126]First English Evangelical Lutheran Church v. County of Los Angeles, Cal., Glendale, 482 U.S. 304, 319, 107 S.Ct. 2378, 96 LEd.2d 250 (1987) quoting Armstrong v. U.S., 364 U.S. 40, 49, 80 S.Ct. 1563, 4 LEd.2d 1554

Equity and fairness demand that when governmental interference with one's property right of access is unreasonable, excessive and abusive to that property owner's particular circumstances, just compensation should not be denied because some of the governmental interference was similarly experienced by the public at large. To deny recovery to an entire neighborhood that suffered damage due to abusive and excessive governmental conduct rewarding the government for improper conduct. For example, suppose that during a construction project the State imposed upon a group of property owners such inconveniences that its actions rose to the level of excessive or abusive conduct. Although the property owners all suffered more serious interference than was expected to be tolerated under Louisiana Civil Code Article 667, and although there was a "taking" or "damaging" of the owner's property rights, none of them would be entitled to damages. Therefore, in the interests of equity, whenever the actions of the State rise to the level of

(1960).

excessive or abusive conduct, all adversely affected property owners should be entitled to damages despite the fact that the same interference was suffered by all those in the general neighborhood. The Constitutions of the United States and Louisiana would have no meaning if the State is insulated from its actions in isolating a neighborhood within a construction project by access that becomes an absurdity due to distance, substandard condition of the roads used for access, excessive confusion or any other factor. If the logic of the honorable Court of Appeal is correct, the State can re-route traffic for a neighborhood by way of Alaska with absolute immunity. At what point does distance become abusive, excessive, substantial or unreasonable?

Accordingly and for similar equitable reasons, Hay's claim for compensation should not be summarily denied because its access was not completely blocked by the abusive, excessive, unreasonable and substantial governmental interference. If the access that remains does not reasonably maintain access to the gene system of public roads by means of transportation that is

normal for land so situated, then the fact that only some round-a-bout, dangerous and inappropriate access exists should not bar recovery.[127] Additionally, the fact that unreasonable and substantial interference with Hay's right of access lasted for a temporary period of time of approximately one year is of no consequence.[128] The "taking" clause of the 5th Amendment mandates payment of compensation for a temporary "taking." (i.e. temporary but substantial governmental interference with one's property right of access).[129]

In this case, since Hay's property rights were substantially interfered with by abusive or excessive conduct of the State, Hay's is entitled to recover damages regardless of the fact that the interference may have been suffered by the general public and/or the interference was only a partial and temporary loss-of-access.

[127]See, Stoebuck, supra, 70-71 and Constance, supra, at 1159-60.

[128]First English Evangelical Lutheran Church, supra, at 318.

[129]Id.

III. THE TRIAL COURT'S CONCLUSION THAT HAY'S SUSTAINED ECONOMIC LOSS IN THE SUM OF $67,849.00 IS FULLY SUPPORTED BY THE RECORD AND IS NOT AN ABUSE OF ITS DISCRETION.

When "property" has been taken or damaged by the State, the owner is entitled to be compensated to the full extent of his loss.[130] The intent of this law is to place the owner in equivalent financial circumstances after the taking by compensating him for all losses sustained.[131] This includes loss of revenue occurring from the taking or damaging of a business and the cost of re-establishing that business.[132]

In this case, the trial court awarded $21,549 for lost profits due to loss of revenue and $46,300 as a residual cost due

[130]LSA-CONST. Art. 1, Sec. 4; See also, Hargrave, The Delcaration of Rights of the Louisiana Constitution of 1974, La.L. Rev. 1, 15-16 (1977), State DOTD v. Dietrich, 555 So. 2d 1355, 1358-59 (La., 1990).

[131]Id. and Chambers, supra at 602.

[132]Hargrave, supra at 16, State DOTD v. Dietrick, supra at 1358, and State, Dept. of Trans. & Dev. v. Tynes, 433 So.2d 809, 817-18 (La. App. 1st Cir., 1983).

to the need to mark down, dispose of and replace old inventory in an effort to re-establish the business that had been taken or damaged.[133] The trial court relied on the testimony of employees of Hay's and Dr. Michael Kurth, Ph.D., an economist, concerning the extent of the damages suffered.[134] Dr. Kurth conducted an analysis of the economic loss suffered by Hay's as a result of the construction activities.[135] He analyzed the daily sales records, financial statements, and inventory data of Hay's from 1978 to 1985.[136] He discussed at length with Mr. Ray Harris, the only officer and sole shareholder of Hay's, the facts and circumstances at the store, its operation and the effect of the construction activities to Hay's.[137] He also analyzed sales data from 1981 to 1985 of Cowboys Western Wear Store and Frank's Western

[133]R. 764-65.

[134]Id.

[135]R. 909-10.

[136]R. 910; See Exhibit P-8 at 663-68.

[137]R. 910.

Wear Store, both local competitors of Hay's in retail sales western apparel market.[138]

From the data and information available, Dr. Kurth determined Hay's lost profits by comparing its revenues before, during and after the construction activities to its competitors calculating Hay's market share over this period of time, determining the loss of market share Hay's experienced during the construction activities, and calculating the difference between the projected revenues Hay's would have earned had there been no loss of market share and Hays' actual revenue.[139] Finally, the lost revenues were then multiplied by Hay's inventory markup to calculate its lost profits.[140]

Dr. Kurth concluded that Hay's lost profits of $6,737 between March, 1981 and September, 1981, $21,549 between October, 1981 and September, 1982 and a residual loss due to

[138]R. 910-11; See also, Exhibit P-8 at 663-68.

[139]R. 912-18; See also, Exhibit P-8 at 663-68.

[140]Id.

old, unwanted inventory of $84,314.[141] With respect to residual loss, Dr. Kurth calculated an alternate method based on Hay's taking drastic action by advertising a big sale, dumping its old inventory at rock bottom prices, and theoretically minimizing its losses.[142] He concluded that the residual loss incurred under this alternate method was $46,300.[143]

The estimate of lost profits was conservative in nature. Dr. Kurth did not consider any factor that might tend to add speculation to his estimates.[144] He did not consider facts such as Hay's doubling the size of its store, renovations to the store or increasing its inventory.[145] Also, the fact that a slump in the economy occurred around the same time that the construction activities began was neutralized by Dr. Kurth's analysis.[146] He

[141]See Exhibit P-8 at 663-68.

[142]R. 926.

[143]See Exhibit P-8 at 664.

[144]R. 922, 928-30.

[145]R. 920-21.

[146]R. 930.

calculated Hay's projected sales based on the actual sales of Hay's competitors in the market.[147] As the competitors' actual sales fluctuated with the economy, so did Hay's projected sales.[148] Dr. Kurth's detailed analysis of lost profits fully supports an award to Hay's for business damages.

In the event this court finds that Hay's is entitled to compensation for damage to a property right, deference should be given to the determinations of the trial court. The trail court accepted the analysis of Dr. Kurth as sufficient to support its conclusion that Hay's incurred business losses from $67,849. The manifest erred doctrine is also applicable to the weight given expert testimony by the trial court and to awards for damages made by the trial court.[149] As in this case, where the experts well reasoned testimony supports an award for damages, when it

[147]See Exhibit P-8 at 666 and 668.

[148]Id.

[149]Acadian Heritage Realty, supra, at 189; State v. Dietrich, supra at 1359.

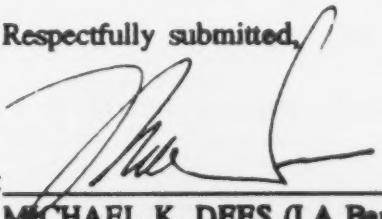
is uncontroverted, where it is accepted by the trial judge, the property owners should prevail.[150]

Finally, if Hay's prevails on the previous issues set forth in this case, then the trial court's award for attorney fees and assessments of court costs should be reinstated.

CONCLUSION

By the abusive and excessive construction activities that occurred along La. Hwy. 397 for a period of over one year, the State has taken or damaged property owned by Hay's. The trial court so held and awarded $67,849 in damages. The decision of the court of appeal should be vacated and the judgment of the trial court should be reinstated.

Respectfully submitted,



BY: _____

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Lake Charles, LA 70601

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[150] State, DOTD v. Dietrich, supra.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HAY'S WESTERN WEAR, INC.
Petitioner

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT, STATE OF LOUISIANA

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APPENDIX A

JUDGMENT OF THE TRIAL COURT

APPENDIX B

WRITTEN REASON FOR JUDGMENT BY THE TRIAL COURT

APPENDIX C

OPINION OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA, NO. 92-1375

APPENDIX D

ORDER OF THE SUPREME COURT, STATE OF LOUISIANA DENYING WRIT OF CERTIORARI AND/OR REVIEW OF HAY'S WESTERN WEAR, INC.

APPENDIX E

KELLY V. LOUISIANA LIMESTONE AGGREGATE, NO. 92-1287, slip op. at SEPARATELY PAGINATED DISSENT (La. App. 3rd Cir., December 15, 1993) (DOMENGEAUX, C. J. AND YELVERTON, J. DISSENTING), Lake Charles American Press, December 23, 1993, at page 1, col. 5

APPENDIX F

EXHIBIT P-2, MAP OF THE CHLOE-MANCHESTER AREA

APPENDIX G

EXHIBIT P-12, CHRONOLOGY GRAPH OF MAJOR ROAD CLOSURES

APPENDIX A

JUDGMENT OF THE TRIAL COURT

HAY'S WESTERN WEAR, INC.	:	14TH JUDICIAL DISTRICT COURT
VS. NO. 83-6425	:	PARISH OF CALCASIEU
STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	:	STATE OF LOUISIANA

FILED: AUGUST 28, 1992

JUDGMENT

This cause came up for trial. Present was the plaintiff, represented by its attorneys, Ernest C. Hunt, Jr., and Steve McGinity, and the defendant, represented by its attorney Ronald J. Bertrand. The Court considered the pleadings, the evidence, and the law, and being of the opinion for the written reasons assigned June 1, 1992, that judgment should have rendered in favor of the plaintiff, Hay's Western Wear, Inc., as follows:

It is ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, Hay's Western Wear, Inc., and

against defendant, State of Louisiana, Department of Transportation and Development, in the sum of $67,849.00 together with legal interest from November 28, 1983, until paid, and in addition thereto, 25% of the total due as attorneys' fees incurred by the plaintiff.

It is further ordered that the defendant pay all costs of court including the expert fee of Dr. Michael Kurth which is set at $3,000.

Judgment rendered June 1, 1992, and read and signed this 24th day of August, 1992.

s/GREGORY D. LYONS
District Judge

Approved:

s/ERNEST C. HUNT, JR.
Ernest C. Hunt, Jr.
Attorney for Plaintiff

s/RONALD J. BERTRAND
Ronald J. Bertrand
Attorney for Defendant

APPENDIX B

WRITTEN REASON FOR JUDGMENT BY THE TRIAL COURT

HAY'S WESTERN WEAR, INC.	: 14TH JUDICIAL DISTRICT COURT
VS. NO. 83-6425	: PARISH OF CALCASIEU
STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	: STATE OF LOUISIANA

FILED: JUNE 1, 1992

LYONS, Judge.

This matter came for trial on an allegation by Plaintiff, a small retail business, in the midst of a construction zone, stating that the road construction done by the State of Louisiana, Department of Transportation an Development, substantially interfered causing severe economic losses. Construction began on this project in March, 1980, and continued until early April, 1983.

Three principal issued appeared for consideration by the court

at trial. First, was the Plaintiff, as the lessee of the affected property, may maintain the action against the Defendant; second, was the Defendant substantially interfered with the Plaintiff's business amounting to a compensable expropriation; third, what damages did the Plaintiff suffer because of the Defendant's actions. After a careful and deliberate considerations by the court, it is the decision of this court to find for the Plaintiff on all issues and award damages.

The Plaintiff is clearly the proper party to bring suit in this matter for interfering with access to the property. The evidence is clear that on November 28, 1983, the Plaintiff did not own the land or buildings at the business location; but simply being the lessee of a parcel of real estate affected by road construction does not deny the Plaintiff a cause of action. See Holland vs. State Department of Transportation and Development, 554 So.2d 727 (La.Ct.App. 1989); Slocum vs. City of Baton Rouge, 536 So.2d 464 (La.Ct.App. 1988); and Kleinman vs. City of Lafayette, 493 So.2nd 890 (La.Ct.App. 1986).

The second issue was whether there was a cause of action

within the law which places upon the Defendant, a duty to act, or not to act. The question for this court to analyze is whether there was substantial interference with the access or ingress and egress to the property occupied by the Plaintiff. The facts indicated that on or about October 5, 1981, the Defendant, and its agents, began construction on the box culvert located between McCown Road and U.S. Highway 90, north of the Plaintiff's location. The Defendant closed the highway until February 26, 1982, cutting off access to the Plaintiff from the north. Customers had to detour to Louisiana States Highway 27 (Manchester Road) to McCown Road. On January 4, 1982, construction began on a new bridge over the Farmer's Land and Canal Company canal on Louisiana State Highway Number 27 (Manchester Road). The road was closed to traffic and remained closed to traffic until early 1983. This action did not immediately affect Plaintiff's business, but will play an important role later in the analysis of what occurred.

From February 26, 1982, until April 16, 1982, construction activities along Louisiana State Highway 397 occurred to the

north and south of the Plaintiff's location. On March 6 to March 9, 1982, north of the Plaintiff, the Defendant installed a cross-drain across the highway, closing the road and restricting access to the Plaintiff's business from the north. On March 10 to March 12, 1982, other work occurred south of the Plaintiff, closing the highway and denying access to the Plaintiff from the south. Various other activities took place south, and north, of the Plaintiff until April 16, 1982, carefully timed to avoid simultaneously closing the highway at both ends.

On June 7, 1982, the Defendant closed for repairs the Louisiana State Highway 397 bridge over Kayouchee Coulee near Joe Spears Road. With traffic blocked on Louisiana State Highway 27 (Manchester Road), access to the Plaintiff from the south was completely restricted. A customer arriving from the south could reach the Plaintiff only by detouring down Joe Spears Road to Boys Village Road, then north to McCown Road and back west on McCown Road to Louisiana State Highway 397, and then south through a construction zone; a detour of seven miles. Customers could access the Plaintiff by U. S.

Highway 90 from the north, but that approach was not always available. From June 22 to June 24, 1982, construction, north of the Plaintiff's location, between McCown Road and U. S. Highway 90, entirely blocked access to the Plaintiff by Louisiana State Highway Number 397. The only access to the Plaintiff from the north required a detour east to Louisiana State Highway Number 27 (Manchester Road) to McCown Road then west, then back south through a construction zone; a detour of three miles. McCown Road became the only access for the Plaintiff and its customers. The situation repeated on July 2, July 6, July 10, July 12, and July 13, when construction closed the highway north of McCown Road. There was testimony that the road would often be closed without notice, exacerbating the access problems to the Plaintiff's location. Customers might find the road blocked one hour and opened the next, or forced to seek a detour of as much as twelve miles.

This untenable situation become worse on July 16, 1982, when the Defendant ordered work on the box culvert north of the Plaintiff's location. The excavation and paving work on the box

culvert required closing the highway north of McCown Road from July 16, 1982 until September 2, 1982. With access from the south completely blocked during this period as well, the only access to the Plaintiff was by McCown Road and through a construction zone.

There is evidence of other interference with the Plaintiff's access or ingress and egress as well. During the construction on Louisiana State Highway Number 397, McCown Road was used as access to the construction site; traffic loads on McCown Road increased proportionately causing McCown Road to deteriorate to a condition at least as bad as the highway under construction. Expenditures by Calcasieu Parish for the maintenance of McCown Road increased during the construction period.

It also appears from the contractors work reports that when access was restricted both north and south of the Plaintiff's location, wet conditions often forced work to stop. The rain delayed construction and made a mess of the construction zone. Unpaved areas became seas of mud trapping unwary drivers. Construction traffic into and out of the construction site brought

mud and muck onto existing access roads making driving a dangerous task at best.

Another indication of the interference with the Plaintiff's right to access or ingress and egress was the placement of detour signs. Individuals approaching the Plaintiff's location on the highways, saw detour signs that gave no directions on where to go, how to reach the Plaintiff, or how to reach any other business located along the construction zone. Nor did the Defendant post any [sic ?signs?] an individual, to give directions for motorists wishing to visit businesses inside the construction zone.

The court also heard testimony that of the businesses located along the reconstructed portion of Louisiana State Highway 397, only two survived past the completion of the project; the Plaintiff, and a small convenience store located near a mobile home park whose only access was through the construction zone. The convenience store sold everyday staples such as bread, milk and, soap, servicing the two hundred families living nearby. Unlike the convenience store, the Plaintiff's customers did not

live inside the construction zone. By the Plaintiff's very location most of its customers lived west of the construction area. Only the most intrepid customers could brave the gauntlet of obstacles created by the Defendant to purchase their western clothing from the Plaintiff.

Common sense guides the court when considering the situation faced by the Plaintiff and others in the area. The residents of the trailer park had no other options than to endure the inconvenience. They could live with the inconvenience, move, or find temporary housing, but the Plaintiff's customers were not forced to suffer any inconvenience. When faced with the prospect of navigating a complicated construction zone, many of the Plaintiff's now former customers shopped elsewhere. Once lost those customers were not likely to return, despite even the heaviest of promotional efforts by the Plaintiff.

The Defendant did point out that when the highway was not mired down, continuous access was provided by some means, no matter how circuitous, to the Plaintiff and its customers. The issue that this court considers appropriate here, is not whether

there was access or whether the Defendant attempted to minimize the problems with the access, but whether the Defendant substantially interfered with the access or ingress and egress of the Plaintiff. The Plaintiff clearly demonstrated that the Defendant substantially interfered with Plaintiff's access or ingress and egress. It is clear from the courts personal knowledge of the area that people seeking to buy the products sold by the Plaintiff, would shop elsewhere when faced with the extreme difficulty and inconvenience of getting to the Plaintiff's business. The inescapable conclusion of the court is that between October, 1981, and September 1982, the Defendant's activities substantially interfered with the rights of access or ingress and egress of the Plaintiff.

The issue of damages must next be addressed. It is clear that the Plaintiff should only recover for the period during which the Defendant substantially interfered with the Plaintiff's rights of access or ingress and egress. After a careful review of the facts, the court finds that Hay's Western Wear, Inc., had their business substantially interfered with from October, 1981, until Septem

substantially interfered with from October, 1981, until September, 1982.

Assessment of economic loss is a question of facts analyzed from the evidence in the case. The court heard testimony of the Plaintiff's damages from the managers of the Plaintiff retailer, and from Dr. Michael Kurth, PH.D; an economist who conducted an analysis of the economic effect of the road construction on the Plaintiff. Dr. Kurth's analysis shows that highway construction from October, 1981, until September, 1982, caused the Plaintiff to suffer lost profits amounting to TWENTY ONE THOUSAND FIVE HUNDRED AND FORTY-NINE DOLLARS AND NO CENTS ($21,549.00).

Economic loss also includes losses other than lost profits for a retailer of soft goods, such as the western style clothing that Plaintiff sold from his store. Clothing inventory ages rapidly and items that to not sell quickly are marked down. Markdowns are a direct economic loss absorbed by the retailer. For the Plaintiff, Hay's Western Wear, Inc., the markdown amounted to FORTY TWO THOUSAND THREE HUNDRED DOLLARS

AND NO CENTS ($42,300.00), based upon a September, 1982, inventory value of $125,000 and allowing the retention of a 40% gross profit on the marked down items. Nor could the Plaintiff be expected to allow marked down inventory to languish on the racks. The situation forced the Plaintiff to conduct an extensive promotional campaign at a cost of FOUR THOUSAND DOLLARS AND NO CENTS ($4,000.00). The total of the Plaintiff's other additional economic losses would thereby amount to FORTY-SIX THOUSAND THREE HUNDRED DOLLARS AND NO CENTS ($46,300.00). The total damages suffered by the Plaintiff are SIXTY-SEVEN THOUSAND EIGHT HUNDRED FORTY-NINE DOLLARS ($67,849.00).

For the foregoing reasons the court awards the Plaintiff damages in the amount of SIXTY-SEVEN THOUSAND EIGHT HUNDRED FORTY-NINE DOLLARS ($67,849.00), with interest from the date of filing of the demand and all costs of this suit.

Without questions the Plaintiff sustained damages far more than the judgement, but the court can only award damages for

the period during which the Defendant substantially interfered and harmed the Plaintiff. Nor can the court award damages unless the Plaintiff can prove the amount of his losses. It is impossible for either the court, the parties or the experts to quantify the value of lost customers and other lost opportunities.

The court further orders that the expert witness fees for Dr. Michael Kurth in this matter be set at THREE THOUSAND DOLLARS AND NO CENTS ($3,000.00).

It is important to note that the Plaintiff should be compensated for all of his losses, not merely inconvenience and loss of profits. Article 1, Section 4 of the State Constitution indicates that full compensation should be granted to petitioner. The court determines that a reasonable and fair attorneys fees should be awarded to petitioner because it had an economic effect on petitioner's recovery and because of the protracted judicial proceedings in this matter. The court finds that after a careful review of the record and complexity of the issues, and the time spent in actual court on this matter, that attorneys fees in the amount of twenty-five (25%) percent of the award should

be rendered in favor of Plaintiff. Defendant is also ordered to pay all costs associated with the prosecution of this law suit.

A judgment to this effect will be signed when presented.

Lake Charles, Louisiana this 1st day of June, 1992.

s/ Gregory D. Lyons
District Judge

APPENDIX C

OPINION OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA, NO. 92-1375

NO. 92-1375

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HAY'S WESTERN WEAR, INC.

PLAINTIFF-APPELLEE

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF

TRANSPORTATION AND DEVELOPMENT

DEFENDANT-APPELLANT

On appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, Honorable Gregory D. Lyons, District Judge, presiding.

Dated Argued: September 1, 1993
Date Decided: October 6, 1993

BEFORE DOUCET, KNOLL, DECUIR, JJ.

DECUIR, Judge.

Plaintiff seeks damages caused by the widening of the highway in front of its retail establishment. The district court

awarded $67,849.00 for loss of business during the construction period plus ex: rt witness and attorney fees.

Essentially, The Department of Transportation and Development contends that its actions did not amount to a substantial interference with plaintiff's access to its property compensable under the law. Plaintiff contends that its property rights were subjected to an inverse condemnation by the diversion of traffic, circuity of travel, and inconvenience associated with DOTD's construction project.

The evidence reveals that plaintiff, Hay's Western Wear, Inc., operates a retail establishment in a leased facility located on La. Highway 397 in Calcasieu parish. From April of 1981 through April of 1983, construction work was done along a 5.111 mile stretch of Highway 397 on which plaintiff's establishment was situated.

During the period of construction access to Hay's was blocked either from the north or south, and for a period in both directions along Highway 397. However, at all times alternate access was available to Hay's, via gravel farm roads in the area.

The official state detour bypassed the area by access to other state roads, while actual access to Hay's at times required utilization of local roadways. Plaintiff did not allege that it was the only business in the area affected. In fact, the record reveals that at least two other businesses operated on the same stretch of Highway 397. In addition, a trailer park and other residential areas were in the area and subjected to similar inconvenience. Aside from occasional instances, the plaintiff ex: rienced no problem with maintenance of its driveways during the period. The driveways were gravel before construction and were maintained in that condition by DOTD during construction. Thus, plaintiff's only complaint is that its business suffered due to the inconvenience created by the construction project and, therefore, the DOTD deprived it of a constitutionally protected property right.

If a public authority substantially interferers with an owner's right of access, the owner has a cause of action under the constitution for just compensation Dickie's Sportman's Centers vs. Department of Transportation, 477 So.2d 744 (La.

App. 1st. Cir. 1985) writ denied 478 So.2d 530 (La. 1985). To sustain this inverse condemnation action a party must satisfy the following three prong test: 1) Has a recognized species of private property right been affected; 2) Has the affected property right been taken in a constitutional sense; and 3) Was the taking for a public purpose. State Through DOTD vs. Chambers Inv. Co., 595 So.2d 598 (La. 1992). Assuming that a recognized property right is affected for a public purpose, the complaining party must prove the presence of some type of ex: or abusive conduct in order to hold the State responsible. Chambers, supra.

Our jurisprudence is firmly established that damages caused by rerouting or diversion of traffic from one roadway to another are not compensable where the means of access to the premises are not substantially impaired or access is impaired on a temporary basis and/or the inconvenience to the owner is not peculiar to him but to the general public at large. Dickie's Sportsman's Centers, supra. Furthermore, points of entry and departure may be restricted for legitimate traffic safety reasons.

Skye Realty Co. vs. State Department of Highways, 345 So.2d 249 (La. App. 3rd cir. 1977).

In the present case the conduct in question was clearly for a public purpose. Therefore, the issue before us is whether DOTD's conduct in carrying out the construction project on Highway 397, was so excessive or abusive as to substantially interfere with a recognized property right of Hay's Western Wear, Inc.

The trail judge found that Hay's suffered a loss of business profits as a result of the construction on Highway 397 and that, under LSA-Const. Art. I, § 4, DOTD is liable to Hay's. We disagree.

Extensive testimony at trial revealed that at no time was access to Hay's completely blocked. In fact, in most instances access was available from either north or south on Highway 397 itself. At other times access was available, though inconvenient, by means of various local roadways. Several witnesses testified that the alternate access was hazardous, inconvenient, and unknown to many of Hay's customers. However, the evidence

revealed that there were other businesses on the same stretch of Highway 397 who were forced to endure the same inconvenience. No evidence was introduced to suggest that Hay's was somehow singled out by DOTD for inconvenient access. In fact, the record indicates that for the most part Hay's driveways were maintained in their pre-construction condition. Finally, Hay's produced no expert testimony to suggest that DOTD inappropriately conducted the construction project on Highway 397.

We were mindful that the factual determinations of the trial court are not to be disturbed on appeal unless clearly wrong. Rosell vs. ESCO, 549 So.2d 840 (La. 1989).

However, the record is devoid of evidence to suggest that the conduct of DOTD was excessive or abusive. Furthermore, it is clear that the inconvenience experienced by Hay's was not unique to it, but was experienced by the public at large in the area. Finally, Hay's access to its business was never completely blocked. As such, Hay's experienced no substantial interference with its access to its premises which is compensable

under our law. The trial court's factual findings to the contrary are clearly wrong.

We need not address DOTD's argument that economic damages are not recoverable as a property right, as we have found that Hay's suffered no compensable injury. For the same reason, DOTD's contention that expert witness and attorney fees were erroneously awarded has merit.

For the foregoing reasons, the judgment of the trial court is reversed, and Hay's Western Wear, Inc.'s petition is dismissed with prejudice. Hay's Western Wear, Inc. is taxed with all costs.

REVERSED.

APPENDIX D

ORDER OF THE SUPREME COURT, STATE OF LOUISIANA DENYING WRIT OF CERTIORARI AND/OR REVIEW OF HAY'S WESTERN WEAR, INC.

THE SUPREME COURT OF THE STATE OF LOUISIANA

HAY'S WESTERN WEAR, INC.

VS. NO. 93-C-2767

STATE OF LOUISIANA,
DEPARTMENT OF TRANS-
PORTATION AND DEVELOPMENT

- - - - - -

IN RE: Hay's Western Wear Inc.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA92-1375; Parish of Calcasieu Fourteenth Judicial District Court Div. "A" Number 83-6425

- - - - - -

Dated: January 7, 1994

Denied.

PFC

WFM

JLD

HTL

PH

WATSON & ORTIQUE, JJ., would grant the writ.

KIMBALL, J., not on panel.

APPENDIX E

KELLY V. LOUISIANA LIMESTONE AGGREGATE,
NO. 92-1287, slip op. at SEPARATELY PAGINATED
DISSENT (La. App. 3rd Cir., December 15, 1993)
(DOMENGEAUX, C. J. AND YELVERTON, J. DISSENTING)

NO. 92-1287

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

PATRICK "DALE" KELLEY

Plaintiff / Appellant

VERSUS

LOUISIANA LIMESTONE AGGREGATES, INC.
and CYRUS INDUSTRIAL MINERALS COMPANY

Defendants / Appellees

Dated: December 15, 1993

DOMENGEAUX, C.J., dissenting.

I respectfully suggest that the majority opinion represents a dramatic departure from the recognized rules of appellate review. I feel rather embarrassed to repeat some of them here, but at the risk of redundancy, do so in the hope that it may benefit some who do not know they exist.

The Louisiana Supreme Court in the case of Rosell v. Esco, 549 So.2d 840 (La. 1989), summarized in manifest error/clearly wrong standard, as follows:

> It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Arceneaux v. Domingue, 365 So.2d 1330, 1333 (La. 1978); Canter v. Koehring, 283 So.2d 716, 724 (La. 1973). See also Sevier v. United States Fidelity & Guaranty Co., 497 So.2d 1380, 1383 (La. 1986); West v. Bayou Vista Manor, Inc., 371 So.2d 1146, 1150 (La. 1979); Davis v. Owen, 368 So.2d 1052, 1056 (La. 1979); Cadiere v. West Gibson Products Co., 364 So.2d 998, 999 (La. 1978); A. Tate, "Manifest Error" Further observations on appellate review of facts in Louisiana civil cases, 22 La. L. Rev. 605, 611 (1962). The appellate review of fact is not completed by reading only so much of the record as will reveal a reasonable factual basis for the finding in the trial court, but if the trial court or jury findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them

cannot be manifestly erroneous or clearly wrong. Arceneaux, supra at 1333, Watson v. State Farm Fire & Casualty Ins. Co., 469 So.2d 967 (La. 1985). In applying the manifestly erroneous--clearly wrong standard to the findings below, appellated courts must constantly have in mind that their initial review function is not to decide factual issues de novo. See, F. Maraist, The Work of the Louisiana Appellate courts for the 1978-1979 Term -- A Faculty Symposium, Civil Procedure, 40 La. L. Rev. 761, 764 (1980); Comment, Appellate Review of Facts in Louisiana Civil Cases, 21 La.L.Rev. 402, 412 (1961); Cf. Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

When findings are based on determinations regarding the credibility of witnesses, the manifest error--clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Canter, supra at 724; Virgil v. American Guarantee & Liability Ins. Co., 507 So.2d 825, 826 (La. 1987); Boulos v. Morrison, 503 So.2d 1, 3 (La. 1987); Williams v. Keystone General Contractors, Inc., 488 So.2d 999, 1001 (La. 1986); Johnson v. Insurance Co. of North America, 454 So.2d 1113, 1117 (La. 1984); Berry v. Livingston Roofing Co., 403 So.2d 1247, 1249 (La. 1981); Crump v. Hartford Accident & Indemnity Co., 367 So.2d 300, 301 (La. 1979). Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a

> reasonable fact of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. See, Wilson v. Jacobs, 438 So.2d 1119 (La. App. 2d Cir. 1982), writ denied, 443 So.2d 586 (La. 1983). Cf. State v. Mussall, 523 So.2d 1305 (La. 1988); Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); U.S. v. U.S. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). But where such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. See Jackson v. Tate, 428 So.2d 882, 884 (La. App. 1st Cir. 1983), citing McDonald v. Book, 215 So.2d 394(La. App. 3d. Cir. 1968), overuled on other grounds, Celestine v. Hub City Motors, Inc., 327 So.2d 700 (La. App. 3rd. Cir. 1976). Cf. Anderson, supra, at 575, 105 S.Ct. at 1512; Schexnider v. McDermott International Inc., 868 F.2d 717, 720 (5th Cir. 1989); Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 770 (5th Cir. 1989); U.S. v. Hibernia National Bank, 841 F.2d 592, 595 (5th Cir. 1988); Hanson v. Veterans Administration, 800 F.2d 1381, 1388 (5th Cir. 1986). (Footnote omitted.)

549 So.2d at 844-845.

Credibility calls are the function and prerogative of the trial court. Holmes v. International Paper Co., 559 So.2d 970 -

(La. App. 2d Cir. 1990); Bruno v. Harbert Intern. Inc., 593 So.2d 357 (La. 1992).

In Bailey v. Smelser Oil & Gas Inc., 620 So.2d 277 (La. 1993), the Supreme Court, citing LSA-R.S. 23:1221(1)(c) for the "clear and convincing" burden of the plaintiff in proving temporary total disability, added:

> While the worker's compensation laws are to be construed liberally in favor of the claimant, that interpretation cannot lessen the plaintiff's burden. [Citations omitted.] Disability can be proven by medical and lay testimony. The trial court must weigh all the evidence, medical and lay, in order to determine if the plaintiff has met his burden. [Citations omitted.] This factual finding should be given great weight and should not be overturned absent manifest error. [Citations omitted.] (Emphasis added.)

620 So.2d at 279-280

In the case of Culp v. Belden Corp., 432 So.2d 847 (La. 1983), our Supreme Court reiterated the standard of review as follows:

> On appellate review, the trial court's factual findings concerning work-related disability should be given great weight and should not be disturbed where the evidence before the trier of fact supports a reasonable

factual basis for the trial court's findings, unless clearly wrong. (Emphasis added.)

432 So.2d at 851.

In the case of Bruno v. Harbert Intern, Inc., 593 So.2d 357 (La. 1992), the trial court held for plaintiff, the court of appeal reversed and the Supreme Court reversed the court of appeal, stating:

> In determining whether the worker has discharged his or her burden of proof, the trial court should accept as true a witness's uncontradicted testimony, although the witness is a party, absent "circumstances casting suspicion on the reliability of this testimony." West, 371 So.2d at 1147; Holiday v. Borden Chemical, determinations as to whether the worker's testimony is credible and whether the worker has discharged his or her burden of proof are factual determinations not to be disturbed on review unless clearly wrong or absent a showing of manifest error. Gonzales

> v. Babco Farms, Inc., 535 So.2d 822, 824 (La. 1988) (collecting cases). Indeed, the manifest error/clearly wrong standard of appellate review applies in compensation actions even when the trial court's decision is based solely upon written reports, records or depositions. Virgil v. American Guarantee and Liability Insurance Co., 507 So.2d 825 (La. 1987).

593 So.2d at 361.

In the case of Williams v. Regional Transit Authority, 546 So.2d 150 (La. 1989), the trial judge accepted the testimony of one physician and rejected that of another; the court of appeal reversed, and the Supreme Court, in recognizing the trial judge's prerogative, held:

> It is well established that the trial judge has considerable discretion in accepting rejecting expert testimony, and that the trial judge's decision to accept the testimony of one one expert over another should not be disturbed absent manifest error. [Citations omitted.]

546 So.2d at 157.

On the question of proof of causation, the Louisiana Supreme Court in Prim v. City of Shreveport, 297 So.2d 421 (La. 1974), stated:

> Although procedural rules are construed liberally in favor of workmen's compensation claimants, the burden of proof, by a preponderance of the evidence, is not relaxed. Thus, the testimony as a whole must show that more probably than not an employment accident occurred and that it had a casual relation to the disability. If the testimony leaves the probabilities equally balanced, the plaintiff has failed to carry the burden of persuasion. Likewise, the plaintiff's case must fail if the evidence shows only a possibility of a causative accident or leaves it to speculation or conjecture. [Citations omitted.]

297 So.2d at 422.

For an excellent reference to the standard of appellate review generally and the restraints imposed on the reviewer concerning factual matters, see the concurring opinion of Justice Ortique in Thomas v. Highlands Ins. Co., 617 So.2d 877 (La. 1993).

Following are the reasons advanced by the trial judge in the case sub judice:

This matter came before the court on a worker's compensation claim for injuries sustained by the plaintiff while employed by the defendant. The issues before the court are whether plaintiff is entitled to supplemental earnings benefit after being fired from employment in 1985, and whether medical expenses after July 6, 1984 should be paid, and also whether penalties and attorneys fees should be awarded to plaintiff for the failure of defendant to pay compensation timely.

The court after a careful consideration of the evidence finds that plaintiff failed to establish by a preponderance of the evidence that any complaints of pain or injury after July 6, 1984, were related to on job injuries sustained by plaintiff in February of 1984. The vast majority of and the huge weight of the evidence, clearly favors the position of the defendant. Numerous exams of the plaintiff reflect no disability related to the accident, with the exception of Dr. Gol's records. The court finds that the evidence of limited problems presented by the defense far outweigh the testimony favoring the position of the plaintiff.

It is clear the opinion of Dr. Foster stated below is the opinion of a number of doctors seen by plaintiff. The court adopts this opinion as most convincing based upon viewing the witnesses, and weighing the evidence. Dr. Foster stated:

> The subject complaints far outweigh any physical findings as he has no objective findings. I do believe that he is sincere and probably still has some slight residual from his straining injury but not enough to prohibit him from continuing work. There is no reason why he can't fulfill his usual occupation as a heavy equipment operator.

It is evident that any problems plaintiff had after terminating his employment in 1985 was not related to his on the job injury. Thusly no medical is recoverable by plaintiff that was incurred after July 6, 1984.

For the foregoing reasons it should be immediately obvious that no penalties or attorneys fees are due in this matter.

The court hereby renders judgment in favor of the defendant and against the plaintiff dismissing plaintiff's claims at plaintiff's costs.

A judgment to this effect will be signed when presented.

Lake Charles, Louisiana this 7th of February, 1992.

In denying plaintiff's motions for new trial, the judge said:

> This matter came for hearing before the court on a motion for new trial from a judgment rendered by the court in this matter on February 18, 1992. After carefully reviewing the record again and hearing the arguments of counsel, the court finds that the motion for new trial should be denied. The court reiterates its reasons for judgment in the previous opinion.
>
> A judgment to this effect will be signed when presented.
>
> Lake Charles, Louisiana this 5th day of June, 1992.

DISCUSSION

As a prelude to a discussion of the legal evidence contained in the record, it is interesting to note that a less than subtle attempt is made in the majority opinion to refer to the plaintiff's use of "Percodan" allegedly prescribed by a Dr. H. L. Snider. At oral argument one of the attorneys indicated that Dr. Snider is a dentist. The majority opinion recognizes that the record is silent as to the reason this medication was prescribed and, in fact, recognized that the "Percodan" was prescribed for

something other than plaintiff's alleged back injury. Notwithstanding, and based on pure unadulterated speculation and self service, the majority opinion states that the Percodan, without a doubt, was an effective aid to plaintiff to control his back pain between August 2, 1984 and November 21, 1984. Thus, the majority herein has, in effect, created and relied on its own "evidence"!

A careful reading of the majority opinion leaves no doubt that it is based on the conclusions of the chiropractor-Dr. Bauer and the Houston neurologist, Dr. Gol. Dr. Gol did state that it was reasonable to assume that the pain which plaintiff complained of when he returned in June 1985 was a recurrence of the original pain, but he also said that it was not possible to exclude a new injury as the cause of the complaints of pain in June 1985.

Except for Drs. Bauer and Gol, the conclusions of all of the other medical experts were unfavorable to plaintiff.

Dr. Clark Gunderson and Dr. Shamieh, physicians chosen by plaintiff to treat him for his February 1984 injury,

released him to return to work in July of 1984.

Dr. Dale Bernauer, who consulted by plaintiff in May of 1986, concluded, after diagnostic testing on plaintiff, that there was no treatment he could offer because plaintiff's complaints did not correlate with the physical findings of the tests.

Dr. Veca saw plaintiff on December 26, 1985 and found no objective evidence regarding plaintiff's continued complaint.

Dr. Romero saw plaintiff in February, April and May of 1984. He found spasms in February and April 1984 and diagnosed plaintiff as having a lumbosacral strain. Plaintiff's last visit to Dr. Romero was on May 21, 1984, at which time plaintiff still persisted to have low back pain in spite of treatment. He found no neurological defects.

Dr. Looney saw plaintiff on February 21, 1984. His report states that plaintiff's X-rays were normal and that the physical examination was "not remarkable."

Referring back to Dr. Gunderson, a reading of his entire deposition makes it clear that whatever problems plaintiff had as of January 1990 were not related to his accident of February

1984. His one isolated response to a hypothet posed by plaintiff's attorney was that it was probable that plaintiff's alleged back problems were related to the February 1984 accident. His responses before and after that statement were couched in the realm of "possible" situations. Eliminating the typical stratagem utilized in the deposition to wile [sic] the doctor from his well-considered opinion, it is clear how Dr. Gunderson stood: Plaintiff's complaints were not referable to the 1984 event.

The neurologist, Dr. Foster, examined plaintiff on August 30, 1984. He received a report of the various tests which had been previously performed on plaintiff, including CT scan, EMG, and myelogram. He also knew that plaintiff had some physical therapy. He was apprised of the fact that plaintiff had previously been seen by Drs. Gunderson, Romero, and Shamieh. His report, which was used by the trial judge as an example of the opinions of a vast majority of the other physicians who saw plaintiff, was to the effect that plaintiff had received a lumbar strain injury of moderate severity and that plaintiff's subjective complaints far outweigh any physical findings as to any objective

findings. He thought plaintiff was sincere and probably still had some slight residual from his straining injury, but not enough to prohibit him from continuing work. The doctor said there was no reason why plaintiff could not fulfill his usual occupation as a heavy equipment operator.

The trial judge was confronted with some credibility questions concerning the legitimacy of plaintiff's complaints in view of the medical evidence, the reason plaintiff was terminated from his job, and certain circumstances concerning activities during the 13 month period from the time he returned to work and the time he became separated from his job.

Plaintiff's job with defendant at the time of his February 1984 injury was that of a heavy equipment operator. He operated a Caterpillar 966-C front end loader and a A-6 bulldozer. The Caterpillar weighed about 20 tons and the dozer about 30 tons. To operate either machine required active use of the arms, legs, feet and body. This is not a cream puff job.

It is obvious that the trial judge did not think it reasonable that a person, complaining as plaintiff allegedly did,

could carry on this strenuous work for 13 months. That circumstance, coupled with the vast majority of the medical evidence, not to mention credibility , obviously caused the district judge to rule against plaintiff.

Applying the rules of appellate review stated above to the circumstances of this case, it is inconceivable that this case should be reversed.

In overruling the trial judge, the majority throws the rule books out of the window.

I respectfully dissent and would affirm the district ruling.

LAKE CHARLES AMERICAN PRESS,
December 23, 1993, at page 1, col.5

RIFT BETWEEN APPEAL COURT JUDGES GROWING.

A growing rift between new and some veteran judges at the Third Circuit Court of Appeal in Lake Charles has the Southwest Louisiana legal community talking.

The problem stems from a high number of court cases overturned this year by five-judge panels a the appeal court.

The court's five new judges -- Billie Woodard, John Saunders, Gene Thibodeaux, Sylvia Cooks and Oswald Decuir -- were elected last year. In many of the overturned cases, at least two new judges on five-judge panels voted with the majority to overturn.

Area lawyers won't talk publicly about the controversy because they may have to bring cases before the judges.

One question they raise, however is just what the court of appeal is supposed to do -- and not do -- when it reviews cases.

In most instances, the courts look for "manifest error" in cases. That means appeal judges can overturn a trial court decision if there is no reasonable basis for it. The appeal court is not supposed to second guess a trial jury or judge its decision.

A dissent opinion, issued last week by Senior Appeal Court Judge Jerome Domengeaux, has apparently brought the issue to a head. The opinion concerned a civil case overturned by the appeal court, and is one of Domengeaux's last opinions before he retires at the end of this year.

Domengeaux was critical of the judges who voted to overturn the case, saying: "Applying the rules of appellate review stated above to the circumstances of this case, it is inconceivable that this case should be reversed.

"In overruling the trial judge, the majority throws the rule book out the window."

Contacted at his Lafayette office Wednesday, Domengeaux said he had no comment about his opinion or reports of problems between the judges on the appeal court.

"It's not proper for a judge to comment about those matters. My opinion is self-explanatory," he said Wednesday.

"I have been on the Court of Appeals for 23 years. It has been my policy not to comment on opinions that I'm involved in. The documents speak for themselves."

Judge Thibodeaux denied any rift between the new and old judges. He admitted there is some friction, but said this is likely when there are 12 different personalities on the appeal court.

"The cases are not being reversed because of a failure to adhere to appellate rules and procedures," he said.

Those reversals by five-judge panels on the Third Circuit Court which have been heard by the Louisiana Supreme Court were upheld.

Two possible reasons for the number of cases overturned are the nature of the cases and a change in the court's makeup, Thibodeaux said.

"I think it's safe to say -- and it's not an exaggeration -- that the philosophical makeup of court has shifted," he said.

"You are going to have different legal philosophies and different methods of interpretation whenever you have 12 different judges. I wouldn't elevate that to a rift. I would say it's a shift in philosophy."

Thibodeaux wasn't on the five-judge panel which overturned the case concerned in the Domengeaux dissent opinion.

Of the opinion, Thibodeaux said: "Because there is criticism doesn't mean the rules of appellate review haven't been followed. It's an existing question of how you interpret those rules."

Thibodeaux said all of the judges respect each other and work together though there are a lot of "strong opinions."

Domengeaux wrote his opinion on the Patrick Kelley versus Louisiana Limestone Aggregates case. It was heard by 14th Judicial District Court Judge Gregory Lyons. Kelly lost the case, but won it on appeal before the Third Circuit.

"Applying the rules of appellate review stated above. . . it is inconceivable that this case should be reversed," Domengeaux wrote. "In overruling the trial judge, the majority throws the rule books out of the window."

In this case, Lyons dismissed Kelly's suit against his employer for supplemental earnings and medical expenses incurred after July 6, 1984. It was found by the court that they were unrelated to his on-the-job injury sustained Feb. 6, 1984.

Kelly appealed the case, stating that he was entitled to supplemental earnings benefits after Aug. 20, 1985, his last day of work, and medical expenses after July 6, 1984.

A five-judge panel of Domengeaux, Henry Yelverton, Jeannette T. Knoll, Saunders, and Woodard heard the appeal. The panel reversed the court's decision by a 3-2 vote with Woodard, Saunders and Knoll voting to overturn.

Judge Knoll is not a new judge. She is serving her second term on the appeal court.

In his dissent opinion, Domengeaux shows his displeasure with what the majority had done.

"I respectfully suggest that the majority opinion represents a dramatic departure from the recognized rules of appellate review," he wrote.

"I feel rather embarrassed to repeat some of them here, but at the risk of redundancy, do so in the hope that it may benefit some who do not know they exist."

The senior judge cites a Louisiana Supreme Court case which states that a court of appeal may not set aside a finding by a trial court or a jury unless there is "manifest error" or unless it is "clearly wrong."

"Where there is conflict of testimony, reasonable evaluation of credibility, and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel its own evaluations and inferences are as reasonable."

The judges review the case from typed transcripts of the court proceedings, and do not have the benefit of hearing and watching the actual witnesses in the case.

Yelverton dissented in the Kelley case for the same reasons Domengeaux did, court documents show.

Initially, the appeal court's decision was stamped: "Not designated for publication." This means the case would not appear in legal journals which cite important cases heard by the appeal courts and Louisiana Supreme Court.

However, a letter was issued two days after this decision was rendered. It stated: "The panel has since decided that the opinion and accompanying dissent should be published."

A legal brief filed by Lake Charles attorney Jim Doyle, who represented the company in this case, touched on the controversy about the appeal court's action on reversals.

Anyone litigating any substantial amount of cases before this court knows that 1993 has been a banner year for five-judge panels, which are compiled only when two judges vote to reverse a trial court's findings in a civil case," Doyle wrote.

"In addition to the fact that trial judges are being reversed routinely the way trial judges are being reversed should be of some concern to those who desire certainty in appellate review," he wrote.

The brief describes getting information from the Third Circuit Court on five-judge panels as "a difficult process."

"In several phone calls, undersigned counsel was ultimately told that no such statistics were available," Doyle wrote.

Doyle was told by Kenneth deBlanc, Clerk of Court, that the only source from which this information could probably be gleamed" was "heldover sheets," according to the brief.

These sheets "are private and intended for circulation only among members of the court. But in comments from other practicing lawyers, it is clear that 1993 has seen an explosion of five-judge panels," he wrote.

Doyle said in his brief that he has had three cases go before the appeal court through Nov. 15, and all three ended up before a five-judge panel.

"In the previous 17 years, this counsel has had 19 cases before the various circuit courts of appeal and never until 1993 had a five-judge rehearing," he wrote.

Doyle found in his research the Third Circuit Court of Appeal has reached opinions in 13 cases this year as of mid-November involving five-judge panels.

"Two of those involve five-judge opinions which have not, for one reason or another, been released for publication," he wrote.

The Third Circuit Court only issued two such opinions in 1990, one in 1991 and one in 1992, according to his brief.

In comparison, Doyle found the First Circuit Court of Appeal in Baton Rouge and Second Circuit Court of Appeal in Shreveport have each issued one opinion as of Nov. 15 involving a five-judge panel.

The Fourth Circuit Court of Appeal in New Orleans issued three opinions involving five-judge panels during the 11 months, but two of the cases were election-related and not civil cases, Doyle wrote.

There were no five-judge panel opinions issued by the Fifth Circuit in Gretna in the same period.

STATE OF LOUISIANA

AFFIDAVIT

PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared ERNEST C. HUNT, JR., Louisiana Bar Number 7053, one of the attorneys for Hay's Western Wear, Inc., who deposed and said:

This map attached to this affidavit with notations shown thereon depict the area and roads controlling the affected area where Hay's Western Wear, Inc.'s business was located on Louisiana Highway #397 in Calcasieu Parish, Louisiana.

My office has been advised this week by the Office of the Clerk of the Louisiana Court of Appeal, Third Circuit, that Exhibit P-2 (map of the affected area) which depicted that area has been lost by the Court and cannot be located.

We have attached a photocopy of an official Calcasieu Parish, Louisiana map for that area without which testimony in Civil Action Number 83-6425, Division A, of the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana, would make little sense.

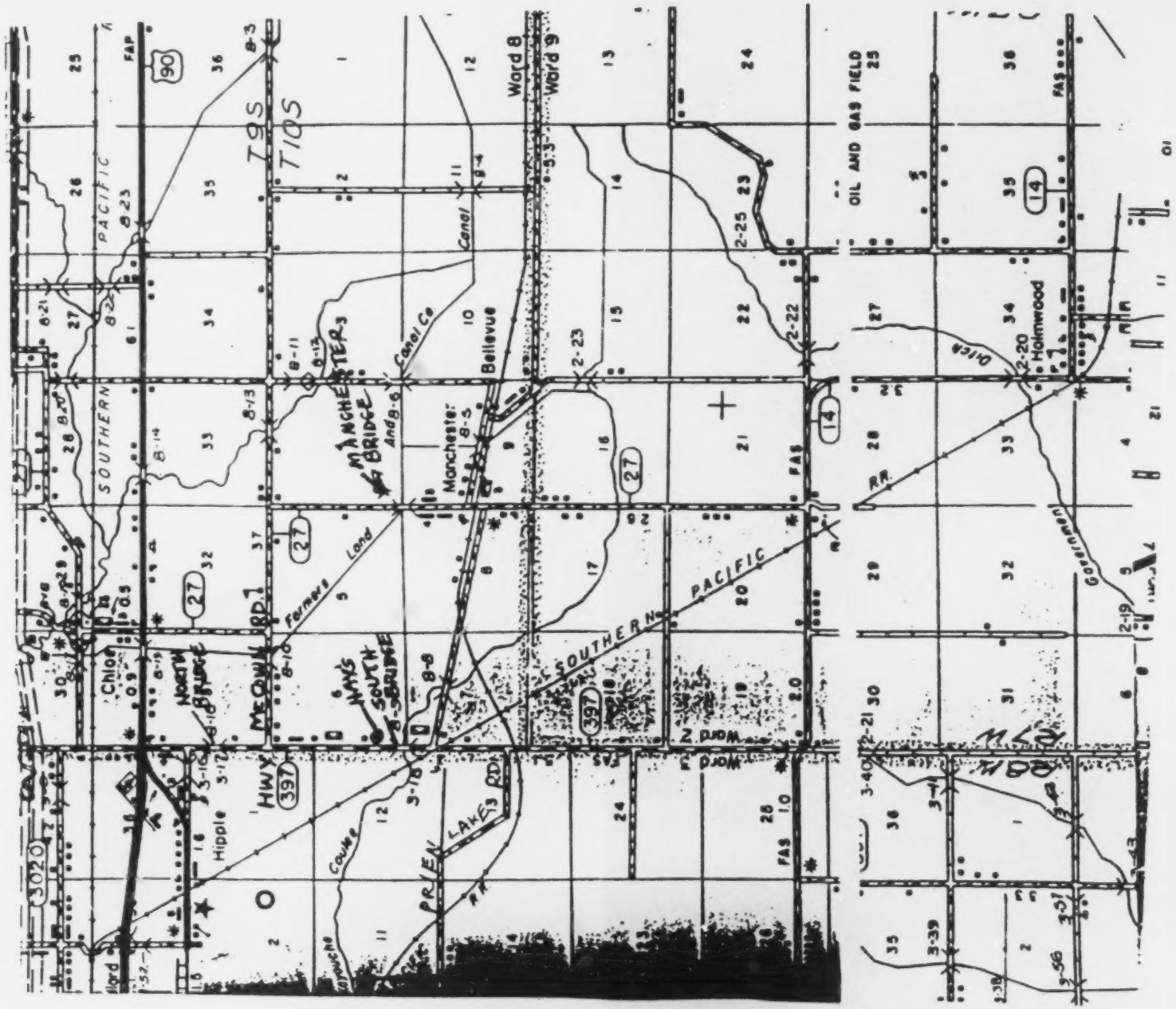
s/ERNEST C. HUNT, JR.
ERNEST C. HUNT, JR.

SWORN TO AND SUBSCRIBED before me this 7th day of April, 1994, at Lake Charles, Louisiana.

s/MARILYN F. WILLIAMS
NOTARY PUBLIC

APPENDIX F

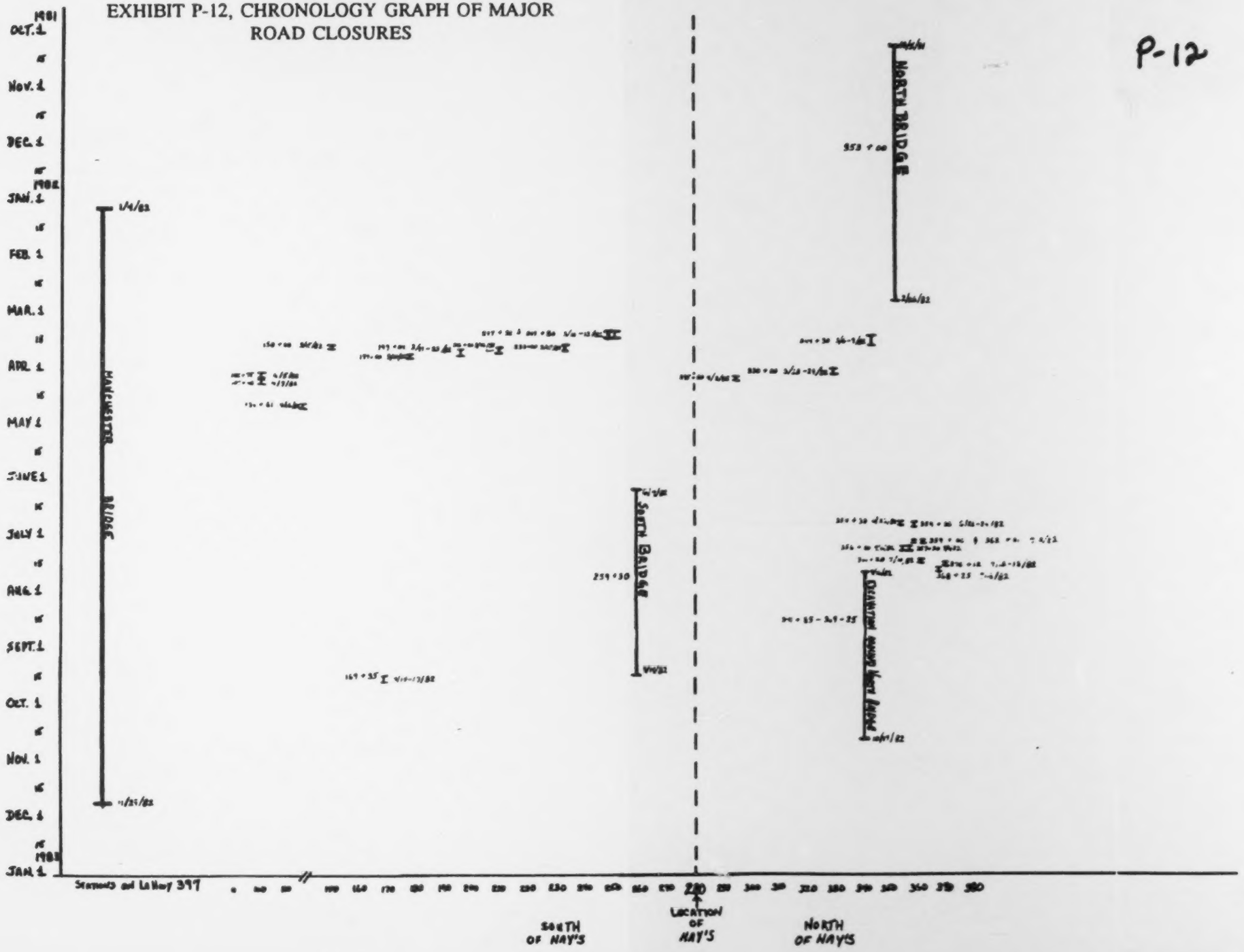
EXHIBIT P-2, MAP OF THE CHLOE-MANCHESTER AREA



APPENDIX G

EXHIBIT P-12, CHRONOLOGY GRAPH OF MAJOR ROAD CLOSURES

P-12



No. 93-1994

JUL 19 1994

In The

Supreme Court of the United States

October Term, 1994

HAY'S WESTERN WEAR, INC.,

Petitioner,

versus

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the construction activities of the Louisiana Department of Transportation and Development constitute a "taking" of private property for public use without compensation as forbidden under U.S. Constitution, Amendment V?

II.

Should this Court consider the "standard of review" applied by the Louisiana Third Circuit Court of Appeal in this case?

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STATUTES

U.S. Const. Amend. V ..... *passim*

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STATEMENT OF THE CASE

This matter involves an inverse condemnation claim by petitioner for alleged business losses arising out of the State's construction activities in a rural area. The original petition was filed in State Court on November 28, 1983. There were other defendants initially, but those defendants were dismissed prior to trial. The only remaining defendant at trial was the Louisiana Department of Transportation & Development.

The construction work which allegedly caused plaintiff's damages herein took place between April of 1981 and April of 1983. The construction project undertaken by the State covered a 5.1 mile stretch of rural state highway near the City of Lake Charles, Louisiana. The project included the widening and overlay of approximately 4 1/2 miles of that stretch and the complete reconstruction of an additional 1/2 mile. Also involved in the project was the reconstruction and/or replacement of two bridges, one of which was located to the North of Hay's Western Wear and the other to the South of Hay's Western Wear.

Prior to and during construction, petitioner operated a retail establishment known as Hay's Western Wear. It was located approximately in the middle of the 5.1 mile project. Since the construction was accomplished entirely within the State's existing right of way, there was no need to expropriate any property from petitioner. There was no physical utilization of any of petitioner's property during construction. Petitioner contends that the construction interrupted its business by making the store less accessible; yet during and after construction, the store was

always open for business and ingress and egress to the business premises were *always* available.

Trial on the merits was held in the Louisiana District Court on January 16 and 17 of 1991. On June 1, 1992, the Trial Judge rendered a judgment awarding business losses to Hay's Western Wear. The Trial Judge found that the construction had aversely impacted the business between October of 1981 and September of 1982. This decision was appealed by the State to the Louisiana Third Circuit Court of Appeal. On October 6, 1993, that Court reversed the ruling of the Trial Court and held that no damages were due as a result of the State's construction activities.[1] The opinion includes the facts upon which the Louisiana Court of Appeal based its decision that no damages were due.

> "During the period of construction, access to Hay's was blocked either from the North or South, and for a period in both directions along Hwy. 397. However, at all times alternate access was available to Hay's, via gravel farm roads in the area. The official state detour bypassed the area by access to other state roads, while actual access to Hay's at times required utilization of local roadways." *Hay's* at pg. 976.
>
> "Aside from occasional instances, the plaintiff experienced no problem with maintenance of its driveways during the period. The driveways were gravel before construction and were maintained in that condition by DOTD during construction." *Hay's* at pg. 976.

---

[1] *Hay's Western Wear v. State, DOTD*, 624 So. 2d 975 (La. App. 3rd Cir. 1993).

> "Extensive testimony at trial revealed that at no time was access to Hay's completely blocked. In fact, in most instances access was available from either the North or South on Hwy. 397 itself. At other times, access was available, though inconvenient, by means of various local roadways." *Hay's* at pg. 977.
>
> "However, the record is devoid of evidence to suggest that the conduct of DOTD was excessive or abusive. Furthermore, it is clear that the inconvenience experienced by Hay's was not unique to it, but was experienced by the public at large in the area. Finally, Hay's access to its business was never completely blocked. As such, Hay's experienced no substantial interference with its access to its premises which is compensable under our law." *Hay's* at pg. 977.

Petitioner applied for a writ of certiorari to the Louisiana Supreme Court wherein it sought to have the judgment of the Trial Court reinstated. The Louisiana Supreme Court refused to review the ruling of the Third Circuit Court of Appeal.[2]

The most relevant facts for the purpose of argument to this Court are: 1) there was no property expropriated from petitioner; 2) there was no physical utilization of petitioner's property during construction; 3) petitioner was able to continue to operate as a retail store continuously during construction; 4) customers were able to get to petitioner's store continuously during construction; 5) the store continued to operate as a retail store after the

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[2] *Hay's Western Wear v. State, DOTD*, 631 So. 2d 452 (La. 1994).

completion of construction; 6) the State exercised no control over petitioner's property or the business conducted thereon before, during or after construction; and, 7) the property continued to be utilized in the same manner during and after construction as it did before, namely as a retail operation known as Hay's Western Wear.

SUMMARY OF ARGUMENT

In this inverse condemnation case, petitioner alleges that the denial of recovery by the Louisiana Third Circuit Court of Appeal constitutes a denial of its right under the Fifth Amendment to the U.S. Constitution. In order to recover under the Fifth Amendment for damages when there has been no formal expropriation or physical invasion of the property, this Court has recently held that the governmental action complained of must result in the denial of all economically beneficial or productive use of the property to the landowner. This Court has further held that even if such governmental regulation or activity denies all economically beneficial or productive use, the landowner may still not recover if the action complained of was a legitimate exercise of the police power of the governmental entity which pre-existed the landowner's ownership of the property.

In this case, the governmental activity complained of was the construction activity necessary to accomplish the project undertaken by the Louisiana Department of Transportation & Development. These activities were conducted solely within the confines of existing right of

way owned by the Louisiana Department of Transportation & Development. There was no formal expropriation from petitioner and there was no physical invasion of the property. During the period of construction, the petitioner enjoyed access to abutting streets from its property and continued to utilize the property in the conduct of its retail business throughout. There has, therefore, been no taking of its property under the Fifth Amendment to the U.S. Constitution.

Alternatively, petitioner argues that the Louisiana Third Circuit Court of Appeal applied an inappropriate standard of review in overturning the award by the Trial Judge. That same argument was advanced to, and rejected by, the Louisiana Supreme Court. The argument does not raise or involve any federal question nor any constitutional issues under the U.S. Constitution or the Louisiana Constitution. Since no federal question is raised by this additional argument, it does not merit this Court's consideration. There is no basis for the granting of this writ application by this Court.

ARGUMENT

Since no formal expropriation took place in this matter, petitioner's theory of recovery in the Louisiana courts was that the construction activities of the Louisiana Department of Transportation & Development amounted to an inverse condemnation which had caused it to suffer business losses. The Louisiana courts have for many years recognized the right of recovery in appropriate circumstances for an inverse condemnation for the taking

or damaging of property other than by formal expropriation proceedings under Article 1, Section 4 of the Louisiana Constitution of 1974, as well as under its predecessor.[3] In a recent case,[4] the Louisiana Supreme Court again recognized the existence of an inverse condemnation right of action under the Louisiana Constitution of 1974. In the *Constance* case, the Louisiana Supreme Court went to great lengths to reconfirm the availability of the remedy and the conditions which must exist for damages to be recovered for an inverse condemnation. The Court made it clear that recovery will not be allowed in every situation in which damages occur, but only in those situations in which the State has caused physical damage to property or where the State's activity is deemed to have been excessive or abusive. Having found neither physical damage to petitioner's property nor excessive or abusive conduct by the Louisiana DOTD in this case, the Third Circuit Court of Appeal held that petitioner was not entitled to recover any damages it may have sustained. By denying petitioner's writ application, the Louisiana Supreme Court agreed.

In its writ application to this Court, petitioner now contends that the guidelines set forth by the Louisiana Supreme Court for recovery in inverse condemnation situations, as followed by the Louisiana Third Circuit Court of Appeal in this case, are contrary to rights set out under Amendment V to the United States Constitution.

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[3] *Reymond v. State, Dept. of Hwys.*, 231 So. 2d 375 (La. 1970).

[4] *Constance v. State of La., DOTD*, 626 So. 2d 1151 (La. 1993).

IS PETITIONER ENTITLED TO DAMAGES UNDER AMENDMENT V TO THE U.S. CONSTITUTION?

This Honorable Court recently re-examined what governmental activities would constitute a "taking" other than the formal expropriation of property.[5] While the *Lucas* case dealt with regulatory takings, the rationale should be the same for other governmental activities, such as construction, which indirectly impact landowners. In *Lucas* this court again repeated that it has avoided any set formula for determining when a governmental regulation or activity has gone too far, but recognized the two basic categories that have triggered the awarding of compensation in these situations.

> "We have, however, described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas,* supra at p. 2893.
>
> "The second situation in which we have found the categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land . . . As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not

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[5] *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992).

> substantially advance legitimate state interests or denies an owner economically viable use of his land'." *Lucas*, supra at p. 2893.

In the instant case, there was no "physical invasion" of petitioner's property. Thus, there has been no taking under the first category referred to above. Neither has there been a taking under the second situation described above. The State of Louisiana had a legitimate state interest in the widening and reconstruction of this rural state highway. Furthermore, the construction undertaken to accomplish those purposes did not deny the petitioner economically viable use of its property. As stated previously and as acknowledged by the Louisiana Court of Appeal, the petitioner continued to utilize the property during and after construction for the same purpose and in the same manner as it did prior to the construction. While petitioner may decry the test applied by the Louisiana Supreme Court of "abusive or excessive conduct" in the absence of physical damage by the State, that standard is surely no more harsh than the requirement imposed by this court that the governmental actions must result in a total loss of use of the property. Regardless of whether or not the standard applied by the Louisiana Supreme Court may in some other particular instance abridge the right to compensation of a landowner under the Fifth Amendment to the United States Constitution, it is obvious under the facts of *this* situation that the holding of the Louisiana Court of Appeal is not in conflict with the holding of this Court in *Lucas* and other similar cases.

Furthermore, the actions of the State in widening and reconstructing this rural state highway, while still maintaining access from the property to an abutting roadway, was a legitimate exercise of the police power of the State which existed long before petitioner herein acquired use of the property. This was clearly recognized and set out by the Louisiana Supreme Court in *Constance*, supra:

> "Furthermore, it has long been recognized that a public body has the right, under its police power, to divert traffic without subjecting itself to liability. *Ramelli v. City of New Orleans*, 233 La. 291, 96 So. 2d 572, 574 (1957). While recognizing that commercial property owners were inconvenienced by the narrowing of a major traffic artery to construct an overpass and by the diversion of traffic some 3000 feet, the Ramelli court noted that the inconvenience was common to all property owners within the same vicinity. Accordingly, the court affirmed the ruling of the trial court that the plaintiff's had sustained a loss without an injury in the legal sense. Similarly, other jurisdictions have concluded that a property owner has no protectible interest in such traffic flow, as opposed to access." *Constance v. State*, supra at p. 1156.

This Court recognized in *Lucas*, as it had on prior occasions, that the State's use of these pre-existing police powers does not give rise to compensation.

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

> This accords, we think, with our takings jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the bundle of rights that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Lucas*, supra at p. 2899.

The petitioner in this case cannot even approach the threshold for compensation set by this Court in *Lucas*. While it may have sustained some inconvenience during construction, that inconvenience was caused by a legitimate application of the police power enjoyed by the State over its own right of way; furthermore, it continued to enjoy the full use of the property during and after construction despite this inconvenience.

SHOULD THIS COURT CONSIDER THE STANDARD OF REVIEW APPLIED BY THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL IN THIS CASE?

A significant portion of the petition for a writ of certiorari filed herein deals with the argument that the Louisiana Third Circuit Court of Appeal committed error in its review of the record. In other words, petitioner argues that the Court of Appeal applied an improper standard of review in reversing the Trial Court. This same argument was made to, and soundly rejected by, the

Louisiana Supreme Court. The jurisdiction of this Court to review state court judgments by writ of certiorari is authorized by 28 USCS 1257. Review is allowed under that statute where the final judgment of the state court (1) deals with the validity of a treaty or statute of the United States; or (2) challenges the validity of a state statute on the ground that it is repugnant to the Constitution, treaties, or laws of the United States; or, (3) where any right is specially set up or claimed under the Constitution or the treaties or statutes of the United States. Rule 10 of the Rules of the Supreme Court indicate that a writ of certiorari will only be granted from a judgment of a state court when that court has decided an important question of federal law which has not been, but should be, settled by this court, or where the decision conflicts with applicable decisions of this Court.

The standard of review applied by Louisiana's courts of appeals to the review of lower court judgments is not such an issue as contemplated above. What standard of review is applied by the Louisiana courts and how they apply it to a particular case does not raise any federal question and should not be considered by this Court. The only possible federal question raised by the petition filed herein is whether or not the final judgment rendered by the Louisiana courts have violated the petitioner's rights under the Fifth Amendment to the Constitution. That issue has already been dealt with above.

CONCLUSION

This Court has recently considered and rejected virtually identical arguments in *LeBlanc, et al. v. State of Louisiana, through the Department of Transportation & Development*, No. 93-1994. The petition for a writ of certiorari in that case was denied on June 20, 1994. The only difference in the two cases is the setting, i.e. the construction in *Constance* was in the urban metropolitan New Orleans area, while the construction in this case occurred in a rural area. In all other respects, the important facts and law applied are identical. This writ application should be similarly rejected.

Respectfully submitted,

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